

No. 13443

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United States  
Court of Appeals  
for the Ninth Circuit

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SOUTHERN PACIFIC COMPANY,  
a corporation,

Appellant,

vs.

ALMA RAISH,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Oregon

FILED

6013 1952



No. 13443

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United States  
Court of Appeals  
for the Ninth Circuit

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SOUTHERN PACIFIC COMPANY,  
a corporation,

Appellant,

vs.

ALMA RAISH,

Appellee.

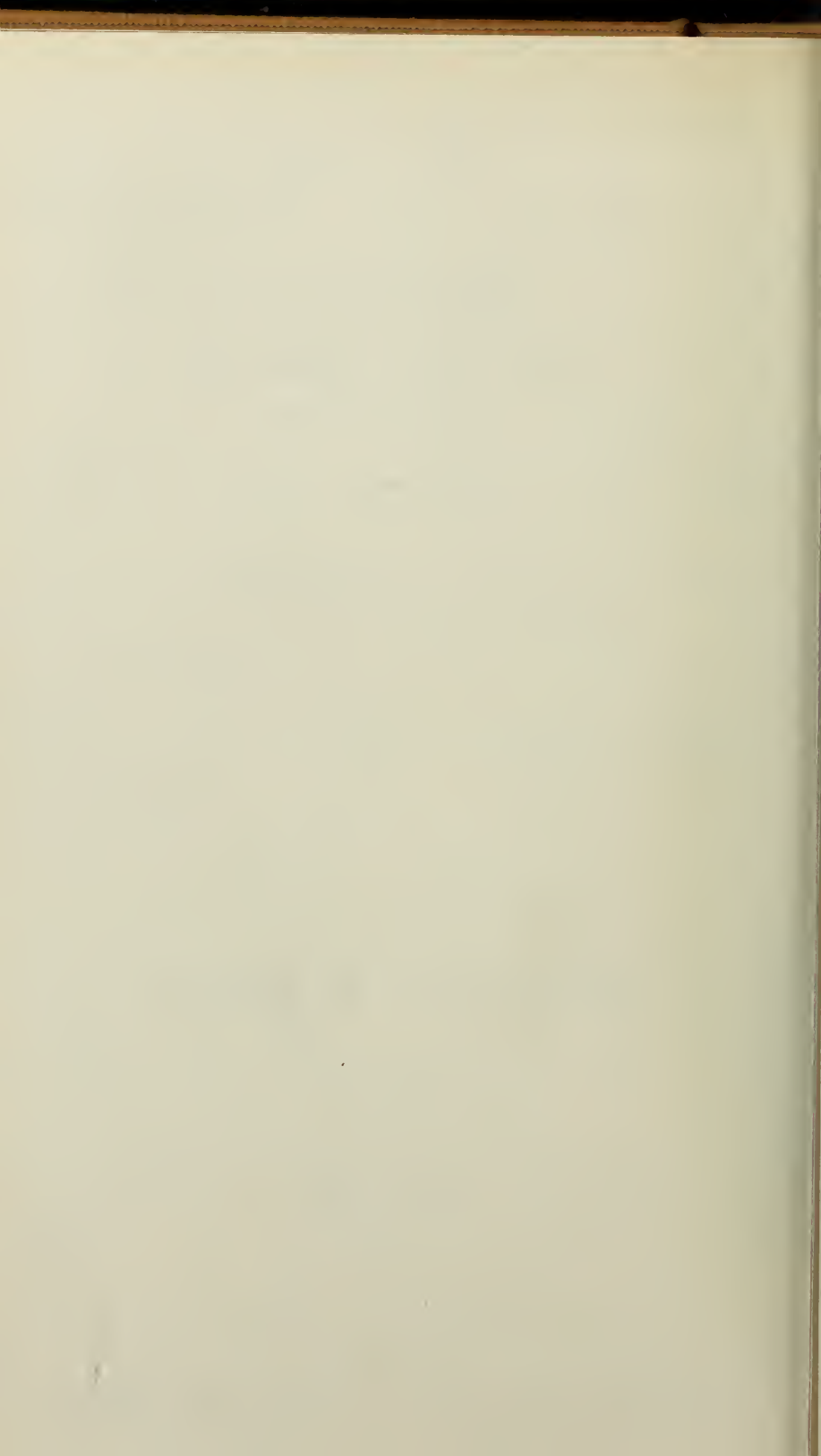
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Transcript of Record

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Appeal from the United States District Court for the  
District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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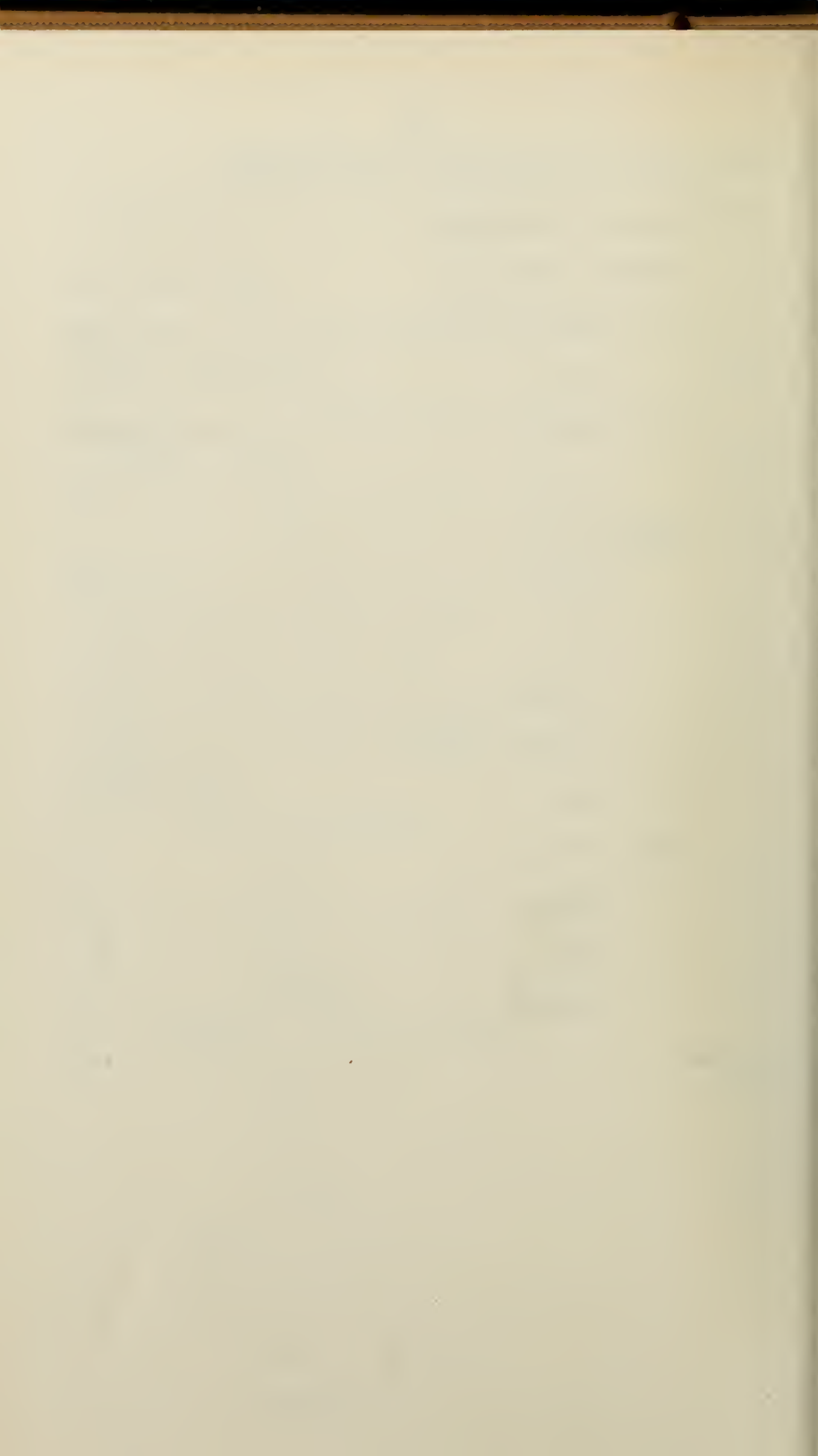
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In the United States District Court for the  
District of Oregon

Civil No. 6141

ALMA RAISH,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,  
a corporation,

Defendant.

### PRE-TRIAL ORDER

The above entitled cause came on regularly for pre-trial conference before the undersigned Judge of the above entitled Court on Monday, January 21, 1952. Plaintiff appeared in person and by Harry F. Samuels of her attorneys and defendant appeared by John Gordon Gearin, one of its attorneys.

The parties with the approval of the Court agreed to the following:

### STATEMENT OF FACTS

#### I.

At all times mentioned in plaintiff's complaint, plaintiff was and now is a resident of the State of Oregon, and defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and is authorized to do business in the State of Oregon. The amount in controversy, exclusive of interest and costs exceeds the sum of \$3,000.00.

## II.

On or about the 17th day of October, 1950, plaintiff was seated in an automobile parked upon the west shoulder of U. S. Highway No. 99 some feet south of the underpass over said highway, which said railroad overpass was owned and maintained by defendant Southern Pacific Company. Said overpass is located a short distance south of Eugene, Oregon.

## III.

At said time and place the automobile in which plaintiff was seated was struck by a truck and trailer owned and operated by Los Angeles-Seattle Motor Express, Inc., a Washington corporation, as a result of which plaintiff received some injury. Immediately prior thereto the truck and trailer of Los Angeles-Seattle Motor Express, Inc., collided with a portion of said railroad overpass when its driver Thomas Ivisin Embleton swerved to his right to avoid colliding with a northbound truck which was entering the underpass and which was being driven partially over the center line of said highway.

## IV.

Thomas Ivisin Embleton was familiar with the existence and location of said underpass and had driven similar equipment through the same on prior occasions.

## V.

Thereafter plaintiff made claim for damages against Los Angeles-Seattle Motor Express, Inc.,



and on or about the 26th day of July, 1951, Transport Indemnity Company, a corporation, for and on behalf of Los Angeles-Seattle Motor Express, Inc., paid to plaintiff the sum of \$27,000.00 in consideration for the execution by plaintiff of a document entitled "covenant not to execute".

## PLAINTIFF'S CONTENTION

### I.

Plaintiff contends that by reason of the negligence of defendant the truck and trailer of Los Angeles-Seattle Motor Express, Inc., was caused to collide with said railroad overpass causing the same to go out of control and to collide with the vehicle in which plaintiff was seated.

### II.

Plaintiff contends that defendant was negligent in the following particulars:

(a) In that it constructed and maintained its overhead crossing at a heighth insufficient for the safe passage of persons making ordinary use of the public highway;

(b) In that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of the public highway;

(c) In that it failed to maintain a true and correct notice to the public of the clearance between the highway and the overhead obstruction;

(d) In that it posted and maintained an inaccurate and misleading notice, and a notice which indicated to the public, particularly persons operat-

ing vehicles upon the public highway, that the clearance was greater than actually existed at the time and place of the collision herein described.

### III.

Plaintiff further contends that as a proximate result of the negligence of defendant, plaintiff received the following injuries: She was generally bruised and battered, and suffered many lacerations about her body, and suffered shock and damage to her nervous system; a fracture of the right scapola and plaintiff suffered multiple fractures to the pelvis with deformities; and fractures of several ribs with deformities; and fracture of the distal one-half portions of each clavicle with deformities; and tearing of the soft tissue and flesh of the right leg above the ankle; and the muscles, tendons and ligaments and soft tissues and nerves of her hand and left leg, hips and back were torn, wrenched and damaged; and plaintiff suffered damage to the veins of the left leg which impairs the blood circulation in that portion of her body; and plaintiff suffered a thrombo-phlebitis; and a phlebo-thrombosis and plaintiff suffered damage to the nerves of her upper lip and nose, with loss of sensation. Plaintiff contends that prior to the occurrence of this collision she was a well, healthy and able-bodied woman, and that as a result of the said injuries as described herein, she has been rendered sick, sore and lame, and suffered extreme and excruciating pain and anguish, and will continue to suffer and to be lame and disabled for the balance of her lifetime, and that as a result thereof she has been

generally damaged in the sum of \$100,000.00. Plaintiff was at the time of the accident 56 years of age with a life expectancy of . . . . years.

Plaintiff further contends that as a result of said injuries as formerly described herein, she has been required to have hospitalization, has been required to employ the services of physicians and surgeons to take care of her, and to have X-rays taken, to purchase medicine and surgical dressings, and to employ an ambulance, and that she will require said medical care and attention in the future; that in treatment of said injuries, plaintiff has incurred the following medical bills and expenses: Rental for crutches from the Eugene Brace and Limb Shop, \$4.00; Medical expense from Dr. Tom Mulholland, \$53.00; Ambulance service from the Valley Ambulance Service, \$30.00; Medical bill from Dr. E. D. Furrer, \$10.00; Medical bill from Dr. Howard A. Molter, \$389.50; Medical bill from Dr. Leonard D. Jacobson, \$51.50; Surgical Hose, \$20.50; Hospital bill at Sacred Heart General Hospital, Eugene, Oregon, \$1,396.80; Dr. Wallace Baldwin, \$330.50.

Defendants admits that the said bills and expenses were incurred by plaintiff, and that the charges for the same are reasonable.

#### V.

Defendant admits that plaintiff was employed as a car man's helper at an average salary of \$257.32 per month at the time of the collision herein described, and that she has lost income to date in the sum of \$4,503.10, and will lose wages in the future. Defendant admits amount of her wage rate.

Defendant, except as specifically admitted herein, denies the foregoing and denies that it was negligent in any particular charged by plaintiff or that any act or omission on its part constituted a proximate cause of plaintiff's injury and damage. Defendant, however, admits that as a result of said collision, plaintiff received some injury, was hospitalized and lost some time from her work.

## DEFENDANT'S CONTENTIONS

### I.

Defendant contends that the sole proximate cause of the collision between the automobile in which plaintiff was seated and the truck and trailer of Los Angeles-Seattle Motor Express, Inc., was the negligence of Thomas Ivisin Embleton, who was at the time and place of the accident acting as an employee of Los Angeles-Seattle Motor Express, Inc., in the scope of his employment as truck driver.

### II.

Defendant further contends that said Thomas Ivisin Embleton was negligent in that:

(1) He drove and operated said truck and trailer at a speed greater than was reasonable or prudent under the circumstances then and there existing;

(2) He failed to have said truck under proper or any control;

(3) He drove and operated said truck and trailer without adequate or efficient brakes thereon;

(4) He failed to maintain proper or any lookout;

(5) He operated said truck at an excessive and unlawful heighth.

(6) He operated said truck at an excessive and unlawful weight.

(7) He operated said truck at a time when the same was equipped without adequate or proper steering mechanism thereon.

III.

Defendant further contends that the payment to plaintiff by Transport Indemnity Company of the sum of \$27,000.00 was in full payment and satisfaction of whatever injury and damage she sustained.

IV.

Defendant further contends that the execution by plaintiff of the document entitled "covenant not to execute" was a release of Los Angeles-Seattle Motor Express, Inc., and as a matter of law a release of defendant.

Plaintiff denies the foregoing.

ISSUES OF FACT TO BE DETERMINED

I.

Was defendant guilty of negligence in any particular charged by plaintiff, and if so was such negligence a proximate cause of plaintiff's injury and damage?

II.

Was Thomas Ivisin Embleton guilty of negligence constituting the sole proximate cause of the collision and of plaintiff's injury and damage?

III.

What is the nature and extent of plaintiff's injury and damage?



## IV.

Did the payment of the sum of \$27,000.00 paid to plaintiff constitute full payment and satisfaction of plaintiff's injury and damage?

## ISSUES OF LAW TO BE DETERMINED

## I.

Did the execution by plaintiff of the covenant not to execute constitute a release of Los Angeles-Seattle Motor Express, Inc., and if so did such release operate to release plaintiff's claim against defendant?

## EXHIBITS

Certain physical exhibits have been identified and received as pre-trial exhibits, the parties agreeing with the approval of the Court that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality.

## Plaintiff's Exhibits

1. Transcript of testimony taken at Eugene, Oregon.
2. Photostatic copy of Tachograph (objection to the foregoing being a copy of the original being expressly waived).
3. Panoramic pictorial photographic view of scene of accident.
4. Photographs.
5. Medical report and notes of Dr. Howard A. Molter.

6. Medical report and notes of Dr. Paul B. Hansen (copy).
7. Deposition and medical report and notes of Dr. W. E. Baldwin.
8. Medical report and notes of Dr. Leonard Jacobson.
9. X-ray photographs taken on behalf of Dr. Paul B. Hansen.
10. Deposition of Thomas I. Embleton.
11. Deposition of plaintiff.
12. Hospital and medical bills, ambulance and drug bills.
13. X-ray photograph of Drs. Slocum and Molter.
14. Topographical map of scene of accident made by Ralph L. Follett.
15. Original Tachograph.
16. Oregon State Highway Department record.
17. Copy of letter from Oregon State Highway Commission.
18. Plaintiff's sealed exhibit A. (18 to 37 inclusive for impeachment purposes only.)
19. Plaintiff's sealed exhibit B.
20. Plaintiff's sealed exhibit C.
21. Plaintiff's sealed exhibit D.
22. Plaintiff's sealed exhibit E.
23. Plaintiff's sealed exhibit F.
24. Plaintiff's sealed exhibit G.
25. Plaintiff's sealed exhibit H.
26. Plaintiff's sealed exhibit I.
27. Plaintiff's sealed exhibit J.
28. Plaintiff's sealed exhibit K.
29. Plaintiff's sealed exhibit L.

30. Plaintiff's sealed exhibit M.
31. Plaintiff's sealed exhibit N.
32. Plaintiff's sealed exhibit O.
33. Plaintiff's sealed exhibit P.
34. Plaintiff's sealed exhibit Q.
35. Plaintiff's sealed exhibit R.
36. Plaintiff's sealed exhibit S.
37. Plaintiff's sealed exhibit T.
38. Covenant not to execute.
39. Photostatic copy of draft.
- 39-a. Bills of Lading.
- 39-b. Officer Hulett's notes.
40. Deposition of Dr. Howard Molter.
41. Deposition of Dr. Leonard Jacobson.
42. X-rays and medical notes.

#### Defendant's Exhibits

11. Deposition of plaintiff as an adverse party.
40. Deposition of Mike McCrary.
38. Covenant not to execute executed by plaintiff on July 26, 1951.
1. Transcript of testimony of preliminary hearing on Thomas Ivisin Embleton.
41. Defendant's interrogatives to plaintiff.
42. Plaintiff's answers.
43. Request for admissions.
44. Answer to request for admissions.
- 45 to 55 (inclusive) Photographs.
57. Map.
58. Map.
59. Deposition of Dr. John Marxer.
60. Sealed exhibit (for impeachment purposes only).



61. Statement of Embleton.
62. Dr. Marxer's X-rays.
63. Transcript of testimony of first trial.

Jury Trial

Plaintiff and Defendant made timely request for trial by jury.

The parties hereto agree to the foregoing pre-trial order and the Court being fully advised in the premises:

Now Orders that the foregoing pre-trial order shall not be amended except by consent of both parties, or to prevent manifest injustice and

It Is Further Ordered that the pre-trial order supersedes all pleadings; and

It Is Further Ordered that upon trial of this cause, no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between plaintiff and defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 23rd day of January, 1952.

/s/ GUS J. SOLOMON,  
Judge

Approved:

/s/ HARRY F. SAMUELS,  
of Attorneys for Plaintiff.

/s/ JOHN GORDON GEARIN,  
of Attorneys for Defendant.

[Endorsed]: Filed January 23, 1952.

[Title of District Court and Cause.]

### VERDICT

We the jury duly empaneled and sworn to try the above entitled cause find our verdict in favor of the plaintiff and against the defendant and assess damages in the sum of \$41,500.00.

/s/ C. F. CALKINS,  
Foreman

[Endorsed]: Filed April 11, 1952.

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In the United States District Court for the  
District of Oregon

Civil No. 6141

ALMA RAISH,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,  
a corporation,

Defendant.

### JUDGMENT

The above entitled matter came on for trial on the 10th day of April, 1952, before a jury, in the Court of the Honorable Gus Solomon, at which time plaintiff appeared in the person and by and through her attorneys Duane Vergeer and Harry F. Samuels, and defendant appeared by and through its attorneys John Gordon Gearin and Oglesby Young,

at which time a jury was duly and regularly impaneled and sworn to try the entitled cause; opening statements were made by the respective counsel, evidence was produced by the plaintiff and defendant, and at the close of said evidence the jury was duly instructed by the Court as to the law of the case, the jury then retired to deliberate upon its verdict and after due deliberation returned into Court its verdict, title and venue omitted, as follows:

“We the jury duly impaneled and sworn to try the above entitled cause, find our verdict in favor of the plaintiff and against the defendant, and assess damages in the sum of \$41,500.00.

C. F. CALKINS  
Foreman”

and there having been introduced into evidence an agreement not to execute which the Court has heretofore construed as being in the nature of a covenant not to sue, and the Court having deducted from the amount of said verdict in the sum of \$27,000.00, and plaintiff having moved for Judgment herein, now, therefore,

It Is Hereby Ordered and Adjudged that Judgment be and the same hereby is entered in this Court in favor of the plaintiff and against the defendant in the sum of \$14,500.00, and

It Is Further Ordered and Adjudged that judgment be and hereby is entered in favor of the plaintiff and against the defendant for plaintiff's costs

and disbursements herein taxed and allowed in the sum of .....

Dated this 7th day of May, 1952.

/s/ GUS J. SOLOMON,  
Judge

[Endorsed]: Filed May 7, 1952.

[Title of District Court and Cause.]

MOTIONS FOR NEW TRIAL AND FOR  
JUDGMENT NOTWITHSTANDING  
THE VERDICT

Comes now defendant Southern Pacific Company and moves the Court for an order setting aside the verdict of the jury in favor of plaintiff and against defendant, received herein on Friday, April 11, 1952, and for judgment in favor of defendant in accordance with its motion for directed verdict made at the close of all the evidence, which said motion on behalf of defendant for directed verdict was taken under advisement and was not granted.

The grounds of this motion are the same as those interposed by defendant in its said motion for directed verdict, and are as follows:

1. There was no evidence that defendant was guilty of negligence in any particular charged by plaintiff.

2. Or that any act or omission on the part of defendant constituted a proximate cause of plaintiff's injury and damage.

3. (In the alternative and as a correlary to ground No. 2, supra.) In negligence of the driver

of the truck of Los Angeles-Seattle Motor Express, Inc., alone or in conjunction with that of the unidentified driver of the red truck, constituted the sole proximate cause of plaintiff's injury and damage.

4. The sum of \$27,000.00 admittedly paid to plaintiff for and on behalf of Los Angeles-Seattle Motor Express, Inc., constituted as a matter of law full compensation to plaintiff for her injuries and damage.

5. The document entitled Covenant not to Execute, which was executed by plaintiff in consideration for the payment on behalf of Los Angeles-Seattle Motor Express, Inc., of the sum of \$27,000.00 was, as a matter of law, a release inuring to the benefit of defendant Southern Pacific Company, and as a matter of law released said defendant from all liability to plaintiff on account of the injuries and damage which she sustained.

\* \* \* \*

In the alternative, and pursuant to the provisions of Rule 50(b) of the Federal Rules of Civil Procedure, defendant moves the Court for a new trial for any one of the following causes materially affecting the substantial rights of the defendant.

1. Excessive damages appearing to have been given under the influence of passion or prejudice.

2. Insufficiency of the evidence to justify the verdict and that said verdict is against law.

3. Error in law occurring at the trial and excepted to by defendant.

\* \* \* \*



In support of defendant's motion for new trial No. 3, supra, the defendant will contend that the Court erred in the following respects:

(a) The Court failed to give defendant's requested instruction No. I as follows:

A. Plaintiff has failed to establish by satisfactory evidence that defendant was guilty of negligence in any particular charge,

B. Or that any act or omission on its part constituted a proximate cause of the plaintiff's injuries and damage.

C. Your verdict therefore must be against plaintiff and in favor of the defendant.

(b) The Court failed to give defendant's alternative requested instruction No. II as follows:

A. It affirmatively appears from the satisfactory evidence that the driver of the truck which struck the automobile in which plaintiff was seated was guilty of negligence which constituted the sole proximate cause of plaintiff's injuries and damage.

B. Your verdict therefore must be against plaintiff and in favor of defendant.

(c) The Court failed to give defendant's alternative requested instruction No. III as follows:

A. It affirmatively appears from the satisfactory evidence that plaintiff has received the sum of \$27,000.00 on behalf of her injuries and damage and that said sum of \$27,000.00 is full compensation to plaintiff.

B. Your verdict therefore must be against plaintiff and in favor of defendant.

(d) The Court failed to give defendant's alternative requested instruction No. IV as follows:

A. It affirmatively appears from the satisfactory evidence that plaintiff has released Los Angeles-Seattle Motor Express, Inc., of any claim which she might have arising out of the accident in question.

B. Your verdict therefore must be against plaintiff and in favor of defendant.

(e) As a correlary to said instruction, and in conjunction therewith the Court erred in failing to construe said written document as a release.

(f) The Court failed to give defendant's requested instruction No. VI as follows:

A. Plaintiff must sustain the burden of proof against defendant by satisfactory evidence.

B. Evidence is satisfactory only if it produces moral certainty or conviction in an unprejudiced mind.

C. Only evidence which produces such moral certainty or conviction is sufficient to justify your verdict. Any evidence less than this is insufficient.

(g) The Court failed to give defendant's requested instruction No. VII as follows:

A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a height insufficient for the safe passage of persons making ordinary use of the public highway.

B. I instruct you that there is no evidence to support this charge.

C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case.

(h) The Court failed to give defendant's requested instruction No. VIII as follows:

A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of a public highway.

B. I instruct you that there is no evidence to support this charge.

C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case.

(i) The Court failed to give defendant's requested instruction No. XIV (c) as follows:

In connection with the charge that the truck of Los Angeles-Seattle Motor Express was being operated without adequate or efficient brakes thereon, I instruct you that there was applicable at the time and place of the accident the following statute of the State of Oregon. (To the Court see 8 O.C.L.A., Sec. 115-376(e):

“(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds, \* \* \*

Miles per Hour	Stopping Distance
10 .....	9.3 feet
15 .....	20.8 feet
20 .....	37.0 feet
25 .....	58.0 feet
30 .....	83.3 feet”



(j) The Court failed to give defendant's requested instruction No. XIV (D) as follows:

Violation of the foregoing statute is negligence as a matter of law.

(k) The Court failed to give defendant's requested instruction No. XIV (E) as follows:

You are instructed that the violation of or failure to obey the requirements of a law which for safety or protection of others commands or requires certain acts or conduct or forbids or prohibits certain acts or conduct is negligence per se, or in other words negligence in and of itself, regardless of what an ordinarily careful and prudent person might do in the absence of such law.

(l) The Court failed to give defendant's requested instruction No. XXI as follows:

If you come to a consideration of the question of damages, I instruct you that before you can award plaintiff any sum of money for alleged permanent injuries, you must be convinced by a preponderance of the satisfactory evidence that permanent injuries are probable. It is not sufficient that permanent injuries are merely possible.

\* \* \* \*

The instructions requested by defendant were prefaced by the following:

"The Court will understand that each subdivision of any instruction is to be deemed a separate and complete instruction."

(m) The Court erred in instructing the jury as follows:

“Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders.

(n) The Court erred in instructing the jury as follows:

“\* \* \* in absence of notice to the contrary, the drivers of vehicles had a right to assume that the defendant would not maintain an obstruction to the highway which would be dangerous to those using it by ordinary means. Of course if the danger was so obvious and apparent that persons, in the exercise of ordinary care, would have seen it, particularly drivers who had passed under it on numerous occasions would be charged with notice of it.

(o) The Court erred in failing to submit to the jury the defendant’s charge that the driver of the Los Angeles-Seattle Motor Express, Inc.’s truck and trailer was guilty of negligence in operating the same without proper or efficient steering mechanism thereon.

(p) The Court erred in permitting the plaintiff to testify concerning her intent or mental attitude and/or the circumstances surrounding the execution of the document entitled Covenant not to Execute.

(The defendant immediately after the receipt of the verdict requested the Court Reporter to prepare a transcript of testimony of the above cause, and the same has not as yet been received. It is impossible therefore for defendant at this time to set

forth the testimony of the plaintiff in this respect, and defendant respectfully requests the permission of the Court to supplement this motion by said testimony at the time the transcript of testimony is received from the Court Reporter.)

/s/ KOERNER, YOUNG, McCOLLOCH  
and DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ OGLESBY H. YOUNG,

Attorneys for Defendants Southern  
Pacific Company

I, John Gordon Gearin, one of attorneys for defendant Southern Pacific Company hereby certify that the foregoing motions are made in good faith, not for the purpose of delay and that the same are in my opinion well founded in law.

/s/ JOHN GORDON GEARIN

Acknowledgment of Service attached.

[Endorsed]: Filed April 21, 1952.

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[Title of District Court and Cause.]

### ORDER

On the 5th day of May, 1952, defendant's motions for new trial and for judgment notwithstanding the verdict came on regularly for hearing before the undersigned Judge of the above entitled Court. Plaintiff appeared by her attorneys Duane Vergeer and Harry Samuels. Defendant appeared by one of

its attorneys John Gordon Gearin. The Court having heard the argument of counsel for the respective parties, having considered the authorities submitted and being fully advised does now

Order that said motions be and the same hereby are denied.

Dated at Portland, Oregon, this 7th day of May, 1952.

/s/ GUS J. SOLOMON,  
Judge

[Endorsed]: Filed June 25, 1952.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice Is Hereby Given that Southern Pacific Company, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain final judgment entered in the above entitled action on May 7, 1952, and from the whole thereof.

Dated at Portland, Oregon, this 29th day of May, 1952.

/s/ KOERNER, YOUNG, McCOLLOCH  
and DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ OGLESBY H. YOUNG,

Attorneys for Appellant

[Endorsed]: Filed May 29, 1952.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between counsel for respective parties that the exhibits admitted in evidence at the trial of the above cause may be considered upon this appeal in their original form, without necessity for reproducing or printing the same.

Dated at Portland, Oregon, this 15th day of May, 1952.

/s/ HARRY F. SAMUELS,  
Of Attorneys for Plaintiff  
/s/ OGLESBY H. YOUNG,  
Of Attorneys for Defendant

[Endorsed]: Filed May 29, 1952.

—————

[Title of District Court and Cause.]

ORDER

The Motion of defendant Southern Pacific Company, based upon Stipulation of counsel for the respective parties on file herein for an order authorizing the transmission of the original exhibits in this case to the Clerk of the United States Court of Appeals for the Ninth Circuit, together with the Transcript of Record, coming on at this time regularly to be heard; and the court being fully advised in the premises, it is

Ordered that the Clerk of this court transmit all of the exhibits introduced in evidence upon the trial



of the above entitled cause with the Transcript of Record to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for the use of the judges thereof, said exhibits by him to be preserved and returned to the Clerk of this Court upon disposition of the appeal.

Dated this 2nd day of June, 1952.

/s/ GUS J. SOLOMON,  
Judge

[Endorsed]: Filed June 2, 1952.

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[Title of District Court and Cause.]

### SUPERSEDEAS BOND

Know All Men By These Presents: that we, Southern Pacific Company, a corporation, as Principal, and Indemnity Insurance Company of North America, a corporation, as Surety, are held and firmly bound unto Alma Raish in the full and just sum of Sixteen Thousand Dollars (\$16,000.00) to be paid to the said Alma Raish, her executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of May in the year of our Lord One Thousand Nine Hundred Fifty-Two.

Whereas, lately in the United States District Court for the District of Oregon in a cause pending in said Court between Alma Raish, plaintiff and Southern Pacific Company, a corporation, defend-

ant, a judgment was rendered against the said Southern Pacific Company, and the said Southern Pacific Company having filed in said Court a Notice of Appeal to reverse the judgment in the aforesaid cause, in which notice was given that appeal was taken to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of the above obligation is such that if the said Southern Pacific Company shall prosecute its appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is delayed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award if it fails to make its appeal good, then the above obligation to be void; else to remain in full force and effect.

SOUTHERN PACIFIC COMPANY,  
a corporation,

/s/ By OGLESBY H. YOUNG,  
Of its Attorneys,  
Principal

INDEMNITY INSURANCE COM-  
PANY OF NORTH AMERICA, a  
corporation,

/s/ By [Illegible] [Seal]  
Attorney-in-fact  
Surety

Countersigned:

CHARLES W. SEXTON COMPANY,  
/s/ By C. D. GREW,  
Resident Agent and Attorney-in-fact.

### ORDER

The foregoing bond is hereby approved and is to stand as a supersedeas until the final determination of the appeal.

Dated this 29th day of May, 1952.

/s/ GUS J. SOLOMON,  
Judge

Consent is hereby given to entry of the foregoing Order.

/s/ DUANE VERGEER,  
Of Attorneys for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed June 2, 1952.

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[Title of District Court and Cause.]

### INSTRUCTIONS REQUESTED BY DEFENDANTS

\* \* \* \* \*

#### VI.

A. Plaintiff must sustain the burden of proof against defendant by satisfactory evidence.

B. Evidence is satisfactory only if it produces moral certainty or conviction in an unprejudiced mind.



C. Only evidence which produces such moral certainty or conviction is sufficient to justify your verdict. Any evidence less than this is insufficient.

VII.

A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a height insufficient for the safe passage of persons making ordinary use of the public highway.

B. I instruct you that there is no evidence to support this charge.

C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case.

VIII.

A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of a public highway.

B. I instruct you that there is no evidence to support this charge.

C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case.

If the Court should decline to grant defendant's requested Instructions Nos. VII and VIII, or either of them, or any subdivision thereof, defendant without waiving the request, saves an exception and asks that the following alternative instruction be given:

\* \* \* \* \*

## XIV.

C. In connection with the charge that the truck of Los Angeles-Seattle Motor Express was being operated without adequate or efficient brakes thereon, I instruct you that there was applicable at the time and place of the accident the following statute of the State of Oregon. (To the Court see 8 O.C.L.A., Sec. 115-376 (e):

“(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when, on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds, \* \* \*

Miles per Hour	Stopping Distance
10 .....	9.3 feet
15 .....	20.8 feet
20 .....	37.0 feet
25 .....	58.0 feet
30 .....	83.3 feet”

D. Violation of the foregoing statutes is negligence as a matter of law.

E. You are instructed that the violation of or failure to obey the requirements of a law which for safety or protection of others commands or requires certain acts or conduct or forbids or prohibits certain acts or conduct is negligence per se, or in other words negligence in and of itself, regardless of what an ordinarily careful and prudent person might do in the absence of such law.

XVII.

If you should believe from the satisfactory evidence that at the time plaintiff executed the agreement entitled "Not to Execute" on July 26, 1951, plaintiff did not expressly reserve the right to sue Southern Pacific Company, then in that event I instruct you that plaintiff can not recover and your verdict must be against plaintiff and in favor of defendant. \* \* \* \* \*

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of pre-trial order, verdict, judgment, motion for new trial and for judgment notwithstanding the verdict, order denying motion for new trial, etc, notice of appeal, supersedeas bond, stipulation re original exhibits, order to send original exhibits, statement of points, designation of record on appeal, and transcript of docket entries, constitute the record on appeal from a judgment of said court of a cause therein numbered Civil 6141, in which Alma Raish is plaintiff and appellee, and the Southern Pacific Company, a corporation, is defendant and appellant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there will be forwarded to you under separate cover exhibits Nos. 2, 3, 4a, 4b,

4c, 4h, 4k, 4l, 4p, 4q, 9, 13, 14, 15, 38, 45, 55, 57, 58 and 62. Also that appellant will send later a transcript of testimony of April 10, 11, 1952, the original of which is on file in this office. Copy of requested instructions by defendant is herewith enclosed, although not on file in this office.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 26th day of June, 1952.

[Seal]

LOWELL MUNDORFF,

Clerk

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In the United States District for the  
District of Oregon

Civil No. 6141

ALMA RAISH,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

a corporation,

Defendant.

Before: Honorable Gus J. Solomon, Judge.

Appearances: Messrs. Vergeer & Samuels (Duane Vergeer and Harry F. Samuels), Attorneys at Law, Portland, Oregon, for Plaintiff. Messrs. Koerner, Young, McColloch & Dezendorf (Oglesby H. Young and John Gordon Gearin), Attorneys at Law, Portland, Oregon, for Defendant.

Court Reporter: Herbert W. White, Jr.

TRANSCRIPT OF TESTIMONY

Portland, Oregon, April 10, 1952, 10 a.m.

(A Jury was duly and regularly impaneled and sworn to try the [1\*] above-entitled cause.)

Opening statements were made to the Jury by Counsel for the respective parties, after which the following proceedings were had:

The Court: Call your first witness.

Mr. Samuels: We will call Mr. Ralph L. Follette.

RALPH L. FOLLETTE

thereupon produced as a witness in behalf of the plaintiff having been duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Samuels): Will you state your name, please?      A. Ralph L. Follette.

Q. Where do you live.

A. In Eugene, Oregon.

Q. How long have you lived there?

A. Since 1945 some time.

Q. What is your occupation?

A. Civil Engineer and surveyor.

Q. By whom are you employed?

A. By myself.

Q. How long have you been doing that type of work?

A. I have been doing that work for about 25 years; in Eugene, for the last seven years. [2]

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.



(Testimony of Ralph L. Follette.)

Q. Did you have occasion to go out to the underpass, we are talking about here, located slightly west of the Springfield Junction? A. Yes.

Q. Did you make a topographical map of that place?

A. Yes. The day after the accident I was asked by the agent of the Transport Indemnity Company to make a topographical map of that underpass.

Q. Did you do that? A. Yes, I did.

Q. I will ask you if that is the map that is there on the board? A. Yes, that is the map.

Mr. Samuels: I would like to offer that in evidence if it isn't in evidence now.

Mr. Gearin: No objection.

The Court: It may be admitted.

(A large map was then offered and received in evidence as Exhibit No. 3 for Plaintiff.)

Q. (By Mr. Samuels): I will ask you, Mr. Follette, if you would mind stepping down and explaining to the Jury the way the highway on the map is situated and so on.

The Court: He may put the map in front of the Jury, if he wishes. [3]

(The witness stepped down from the witness chair to use the map.)

Q. (By Mr. Samuels): Let me ask you first, Mr. Follette, to point out to the Jury what road runs there?

A. The road doesn't show on the map the way it is folded now. It isn't spread out far enough. May I spread it out more?



(Testimony of Ralph L. Follette.)

Mr. Samuels: If you wish and it will help, Mr. Follette.

(The witness then spread out the map.)

A. (Continued) The way the map is here, this is the north, (indicating) to this point there the highway would be north and south with this point north. Coming south you would be coming from this direction, going down and through the underpass here, (indicating). The highway lies right here (indicating) and the railroad at this angle here, so when you go through the underpass you are not quite square with the railroad. This county road that comes in here (indicating) is on the south side of it and is shown coming in right here. The transport truck was coming from the north, coming down through here (indicating) to where it ended up over on this side (indicating).

Q. Does that highway run generally north and south?

A. Yes, that highway runs generally north and south.

Q. What is the direction of the railroad bridge that goes across it? [4]

A. That is generally east and west.

Q. Is it a true north and a true east; is it at a true right angle?

A. True north is this way; they don't cross at true right angles. There are a few degrees that they are off. It isn't a true 90° angle.

Q. Referring to your diagram at the lower right hand part of your chart, what does that show?

(Testimony of Ralph L. Follette.)

A. Well to start with, the chart in the lower left hand corner, that is a full size scale opening of the pass if you were right square with it, then it is the same as if you were coming directly through it. That would narrow down on the opening beyond there on the right. This is one side of it, not the full size opening due to the angle across it.

Q. At the time you made this drawing, how wide was the pavement as to the edge of it as you enter the underpass on the north?

A. Well, I measured it there and it was 8 feet 8 inches as you enter the underpass on the north from the center of the yellow stripe to each pavement edge.

Q. Going on through it to the east edge of the road, how far would that be?

A. Eight feet 4 inches.

Q. Is that from the center of the pavement?

A. Yes, it would be a total of 17 feet then.

Q. Is there a shoulder there or was there at that time? [5]

A. Yes, a very narrow shoulder. From the pavement over on the right hand side over to the concrete pier or brace was 17 inches. On the left hand side as you go in, that would be on this corner over here (indicating), there was a 26 inch shoulder.

Q. There isn't any question that the right hand side is the west side, is there?

A. That is correct. You enter from the north going south.

Q. What is the condition of the pavement as to being flat or level?

(Testimony of Ralph L. Follette.)

A. Well, I took the levels in there and measured the clearance there several places under the bridge—you mean through there on a general projectile?

Q. Yes, on a general projectile.

A. Generally as you go through there, it curves back to the edge of the pavement. There is about, from the clearance of the edge of the pavement, about 12 feet 10 inches in the center to a little more on this side (indicating) 12 feet 10 $\frac{1}{4}$  inches here. I also state in there an inch and a quarter crown. Those two measurements don't exactly work out. I didn't have a chance to check it. They got it away from me before I could. I determined an inch and a quarter crown by that series of measurements through there.

Q. Referring to west edge of the pavement itself, was there—were there any depressions in there as you go through?

A. Just the normal edge of the highway. [6]

Q. Any mud shoulders, anything like that?

A. No, because there was no water in there, not when I got there the day after the accident. I wasn't there the day of the accident, but the usual gravel right in there, just the normal edge of the highway like it would be where you are always hitting, the edge is broken like any oiled road would get.

Q. Referring to the top of the drawing, what is the distance between the pavement level and the underpart of the underpass in the center?

A. In the center from the pavement level to the underside of that main beam, I measured 12 feet 10 inches.

(Testimony of Ralph L. Follette.)

Q. You have described some cross beams?

A. Yes, knee braces or whatever you want to call them. They are on all four corners.

Q. Can you tell the Jury how far it is from the west edge of the pavement level to the lowest part of the angle iron up in the right hand corner, the distance between the pavement and the lowest part of the angle iron?

A. The angle irons are really square braces going at 45° angles but when you come around and look at it, due to the angle of crossing it narrows up. But beyond it the distance is the same but it will narrow it up to 25¾ inches compared to what you see because of the angle of the crossing. So from the edge of the pavement that would be sticking out there 2¾ inches. (Indicating). [7]

Q. Is that the portion of the angle iron that protrudes over the edge of the pavement itself?

A. It is clear right up at the top, just there over the edge of the pavement.

Q. Do they protrude over the pavement or just to the edge of it?

A. The way I have my figures it would show it extending 2 inches.

Q. Which way?           A. Into the pavement.

Q. Over the pavement?    A. Yes.

Q. What is the overall width between the steel uprights?

A. When it is square it is 24 feet between the main steel upright, but to this angle, it is 21½, effective clearance there.

(Testimony of Ralph L. Follette.)

Q. How far do these angle irons protrude out from the side?

A. It was  $21\frac{3}{4}$  inches from each side. That would be 17' 4" clearance on the beam up above.

Q. You refer there to it as you see it when you approach it?

A. As you see it when you approach it from the road.

Mr. Samuels: You may take your seat again now. Please take the stand again now.

(The witness then returned to the stand.)

Mr. Samuels: We would like the tachograph, which is Plaintiff's Exhibit No. 2. Your Honor, [8] I will offer this in evidence now.

Mr. Gearin: No objection.

The Court: It may be admitted.

Mr. Samuels: There is the original tachograph in there someplace; it is No. 15. We will offer that at this time.

Mr. Gearin: No objection.

The Court: It may be admitted.

(An enlargement of a tachograph marked Plaintiff's Exhibit No. 2, and the original tachograph marked Plaintiff's Exhibit No. 15 were then offered and received in evidence.)

Q. (By Mr. Samuels): I am handing you both the photostatic copy of the tachograph that came on the truck, also the original and I will ask you to examine those and see if the blown up one is a true copy of the original?



(Testimony of Ralph L. Follette.)

A. Yes, I have seen both of these before and I can see no difference. They are the same. This (indicating) is the photostatic copy of the original.

Q. What is a tachograph?

A. That is just a clock, you might say, with this face here (indicating) and this line here is made with a recording needle, and it is sometimes referred to as a tattletale on the truck because it tells just what the truck is doing all the time. [9] When the truck is checked out, this rotates as the truck runs and the needle works on it when the clock is running so it records the maximum speed and the duration of that speed and then when the truck slows down for stoplights and all like that, it shows the slowing down and tells what the truck is doing from the time the truck is checked out until it goes back in.

Q. Are there lines on there? Do the small lines on there show what the speed of the truck is?

A. It records on the lines showing what the truck is doing all the time.

Q. Does that one which you have in your hand also have lines on it?      A. Yes.

Q. Are you familiar with that type of an instrument? Can you read it?      A. Yes.

Q. Will you tell us what that shows as far as the speed of the truck is concerned, from the time the truck stopped going back, in other words, from the place where the vehicle stopped going back through the bridge, what does the tachograph show as far as the speed is concerned?

A. When you take the last line on this, that is



(Testimony of Ralph L. Follette.)

where it shows the truck stopped—the long heavy line back into the first place where you have a vertical line, going to the top of that to where it changes or fluctuates, it reads just short of 30 [10] miles, probably between 28 or 25 miles, someplace right in there. Then it goes down to no speed shown, which would probably be back up at the Springfield “y” where the truck would have had to stop for a stoplight. So when I refer to the stoplight, that is right here (indicating). He had put it up to around 25 or 28 miles per hour when he started to slow down. You can see there is some distance in there shown by the time interval, but there is no considerable horizontal line showing speed to go on. According to that he was going just about 30 miles per hour at the time he stopped.

Q. How far is the “y” junction where the stoplight is to where the bridge is?

A. It is about 700 feet south of the Springfield “y”.

Mr. Samuels: No further questions.

#### Cross Examination

Q. (By Mr. Young): Is it your testimony that you made that map at the request of the Transport Indemnity Company?      A. Yes.

Q. How much notice did you have for making that map?      A. Practically none.

Q. The map was made in quite a hurry?

A. Yes.

Q. I was down to your office in Eugene, wasn't I? [11]      A. Yes.

(Testimony of Ralph L. Follette.)

Q. Didn't you admit in your office that the map could have been off some as far as distances were concerned?

A. It was made in an awful hurry, but the measurements that were taken were taken pretty carefully, and I doubt if you will find anything too much out of line.

Q. You have already admitted that your measurements were off as far as the clearance goes, isn't it?

A. No, not too much. Two measurements might differ a little on the pavement, because the oiled surface is pretty well worn and irregular.

Q. You have stated the pavement of the bridge portion of the highway under the underpass was 17 feet in width, isn't that correct?      A. Yes.

Q. And then the clearance directly under the underpass between the two angle irons is 17 feet 4 inches, isn't that correct?

A. Well, if that is on the map—that sounds right.

Q. Would you mind checking the map to see if that is correct?      A. Well, it sounds right.

(Mr. Follette goes to the map.)

A. (Continued): Yes, that is right.

Q. It was also your direct testimony that there was 21 feet 7½ inches clearance—what was that measurement? Was that as you face the underpass? [12]

A. Yes, that would be clear over in each direction. Stating that again, that is clear over to the main steel member.

(Testimony of Ralph L. Follette.)

Q. You stated that you figured that—did you actually measure that distance or just figure it?

A. I didn't just figure it. I actually measured it to find out those measurements. Then I checked it, so I have it both ways.

Mr. Young: No further questions.

### Redirect Examination

Q. (By Mr. Samuels): That road that comes in, going south and comes in from the right, how far is the near edge of that road to the south edge of the underpass, do you have any idea?

A. Well, it is drawn there and it is to exact scale—about 50 feet.

Q. About 50 feet?           A. Yes.

Mr. Samuels: That is all.

Mr. Young: That is all.

The Court: You are excused, Mr. Follette.

Witness excused.

Mr. Samuels: Call Mr. Hulett.

### EUGENE G. HULETT

thereupon produced as a witness in behalf of the plaintiff, having been duly sworn, testified on examination as follows: [13]

Q. (By Mr. Samuels): Will you state your name name to the Jury, please?

A. A. Eugene G. Hulett.

Q. Where do you live, Mr. Hulett?

A. In Eugene.

Q. What is your occupation?

(Testimony of Eugene G. Hulett.)

A. I am a private in the Oregon State Police.

Q. On the 17th day of October, 1950, by whom were you employed?

A. By the State of Oregon, state police.

Q. Your duties at that time were what—what were your duties?      A. Regular routine patrol.

Q. Did you have an occasion during the course of your employment as a police officer to go to the scene of this accident?      A. Yes, I did.

Q. Do you recall about what time you arrived there?

A. I arrived at the scene of the accident at 1:40 p.m. on October 17, 1950.

Q. Do you recall the weather conditions?

A. It was raining.

Q. When you arrived there, what did you find, in particular, referring to the Los Angeles-Seattle Motor Express truck and passenger cars near there?

A. I observed 4 passenger cars there, a truck and a trailer. [14] Three of the passenger cars were facing east and west to the highway on the west side of Highway 99 in front of the Glenwood Auto Wreckers. Then I saw a Kaiser sedan, which had evidently collided with left side of one of these cars and a Los Angeles Seattle Freight truck was astraddle the middle portion of this Kaiser sedan. This was about 200 feet south of the underpass.

Q. Did you measure that?      A. Yes.

Q. What was the distance between the rear of the Los Angeles-Seattle Motor Express Truck and the south edge of the underpass?

(Testimony of Eugene G. Hulett.)

A. From the driver axle of the truck to the underpass I measured 177 feet 4 inches.

Q. You said the pavement was wet, is that right at that time?      A. Yes.

Q. Where was the truck in respect to the Kaiser automobile—I mean what were their positions to each other?

A. It was straddled, the front axle of the truck was straddling the whole body of the Kaiser sedan. The front axle was situated just about where the windshield of the Kaiser would be, up over the body of the Kaiser.

Q. On top of the car?      A. Yes.

Q. The wheels of the front of the truck were off the ground?      A. Yes, off the ground.

Q. Was Mrs. Raish in the car? [15]

A. Yes.

Q. Where was she?

A. She was pinned partially underneath the seat and underneath the dash.

Q. How long did it take you to get to the scene of the accident after you received the call?

A. Approximately 3 minutes.

Q. Where were you at the time of the call?

A. I was at 10th and Main Streets in Springfield, about 20 blocks from the accident.

Q. How did you receive the call?

A. By radio.

Q. Did you go there after you received the call?

A. I went there immediately.

Q. Did you stay at the scene of the accident until Mrs. Raish was removed?      A. I did.



(Testimony of Eugene G. Hulett.)

Q. How long was she in that car?

A. Approximately an hour and a half.

Q. Do you recall how she was removed, how did you get here out?

A. By use of heavy equipment, as near as I can remember now.

Q. Would that pull the vehicles apart?

A. Yes.

Q. The car containing Mrs. Raish—did you take any measurements as to where it stopped after the accident with respect to the [16] west edge of the pavement? A. Yes.

Q. How far was it off the road?

A. From the center line of the highway to the center of the front axle of the Raish car was a distance of 21 feet 8 inches.

Q. That is from the center of the highway?

A. Yes.

Q. Do you know how far it was from the edge of the highway?

A. I don't know that exact measurement. I find the pavement at this point was 21 feet 1 inch in width.

Q. What was the distance from the center of the highway and the car?

A. 21 feet 8 inches.

Q. Where was the truck in respect to the nearest part of that vehicle, from either the center of the highway or the west edge?

A. Will you please repeat that?

Q. How far was it from either the center of



(Testimony of Eugene G. Hulett.)

the highway or the edge to the nearest part of the truck?      A. 26 feet 4 inches.

Q. From which measurement?

A. From the center of the highway to the front axle.

Q. Could you tell, Officer Hulett, from looking at the pavement there or from your measurements, if the front wheels of the truck had been off the ground for any distance before they came to a stop? [17]

Mr. Gearin: Just a minute, I think that question should be objected to. It should be confined to a certain time and to certain points. The highway is very long and when Officer Hulett saw the truck—we should first find out if Officer Hulett saw the truck at any time when it was underneath the underpass.

The Court: I think the officer can testify and answer the question and tell us that.

Q. (By Mr. Samuels): Go ahead and answer the question, Officer Hulett.

A. That would be a very difficult question to answer. It appeared that this truck had been astraddle of this car for some distance, but I don't know how far.

Q. What was Mrs. Raish's condition when you saw her there?

Q. Oh, she was part of the time conscious, I should say most of the time she was conscious. There was only one time that I recall that I saw her that she appeared to be unconscious, I think.

(Testimony of Eugene G. Hulett.)

Q. Could you see any injuries to her at that time?

A. I didn't examine her, but she was severely injured, of course.

Mr. Samuels: No further questions.

Cross Examination [18]

Q. (By Mr. Gearin): Officer, you have been requested to attend this trial in behalf of the Southern Pacific Company too, haven't you?

A. I have.

Q. When you got there, this truck you might say generally ran right over the top of Mrs. Raish's car, isn't that right? A. That is right.

Q. When you got there the front wheels were about 2 feet off the ground? A. Yes.

Q. And was the truck on top of Mrs. Raish there and you could see where it hit and push the three cars in front of Mrs. Raish's car, couldn't you? A. That is right.

Q. All had banged up against a telephone pole there and had stopped? A. That is right.

Q. Now going back, I think you referred to your notes, Officer Hulett, and you said from the front axle of the truck itself, from the front wheel of the truck on the left side to the center line of the highway, you say was 26 feet 4 inches, is that right?

A. Yes.

Q. Then you take as the distance of the highway—did you determine how far it was from the edge of the highway? [19]

A. Approximately 10½ feet.

(Testimony of Eugene G. Hulett.)

Q. And from the rear axle of the truck down to the south side of the underpass was a distance, I believe you stated, of 177 feet 4 inches?

A. Yes.

Q. From the south side of the underpass to the front of the truck where the vehicles came to rest after the collision with the Raish car and the three other automobiles was an estimated distance of 215 feet, is that right?      A. That is right.

Q. At the time of the accident as you approached the scene of the accident from the north, on the north side of the underpass, do you recall whether or not there is a street sign, a State Highway Department sign, on the right and another sign on the highway which contained these words, "Low, Narrow Bridge"?      A. I believe so.

Q. There was at the time of this accident one of those signs?

A. I believe there was.

Q. Did you talk to Mr. Embleton, the driver, at the time of the accident after the accident?

A. At that time?

Q. After the accident, yes?      A. Yes.

Q. What did he say to you with respect to his speed?

A. He told me he was driving in the neighborhood of 35 miles [20] between 30 and 35 miles per hour.

Q. Did he say anything to you at that time about his brakes?      A. No.

Q. Did he say anything at that time about the steering mechanism of his truck?      A. No.

(Testimony of Eugene G. Hulett.)

Q. Did he say anything at that time that he had run into the underpass?

A. I don't recall.

Q. Did he make any explanation at that time as to how the accident occurred?

A. There was some explanation made as to the damage to the truck when it hit the underpass, but not right at that time.

Q. Were you able to ascertain from your examination, Officer Hulett, whether or not it was the pole that stopped the motion of these cars and the truck?

A. I would say that it did.

Mr. Gearin: That is all.

#### Redirect Examination

Q. (By Mr. Samuels): Did you see any damage to the truck other than the motor and underpart?

A. Other than what?

Q. Did you see any damage to the upper part of the truck [21]

A. Yes.

Q. Where?

A. On the right hand upper corner.

Q. Will you describe that damage, please?

A. Oh, the box is made of aluminum alloy metal of some kind, and there was some aluminum metal taken off from the corner of the truck there, and there was some on the bridge.

Q. Did you examine the underpass or any part of it to see if there were any pieces there?

A. Yes.

Q. Were there any there? A. There were.

Mr. Samuels: I believe it will be stipulated be-

(Testimony of Eugene G. Hulett.)

tween the parties that this is the tachograph taken from the truck.

Mr. Gearin: We will have no objection.

The Court: It has already been admitted in evidence.

Mr. Samuels: We will offer Plaintiff's Exhibits No. 4-B and 4-A.

Mr. Gearin: We have no objection.

The Court: They will be admitted.

(Photographs, Plaintiff's Exhibits No. 4-A and 4-B were then offered and received in evidence.) [22]

Q. (By Mr. Samuels): I will ask you to tell the Jury what those pictures are taken of?

A. Exhibit No. 4-A shows the end of the underpass looking south, actually the west side of the underpass.

Q. You mentioned something about a piece of aluminum there. Is that shown in the picture?

A. Yes, I believe it is.

Q. Where is it?

A. The pieces are in the upper right had corner of the underpass, up underneath the underpass.

Q. Will you examine the other photograph and tell us what that shows?

A. That is No. 4-B. It is a photograph also of this same underpass, looking north and shows some pieces of metal hanging down from the ladder there.

Mr. Samuels: We will offer in evidence Plaintiff's Exhibits No. 4-L, 4-H, 4-K and 4-C.



(Testimony of Eugene G. Hulett.)

Mr. Gearin: We have no objections.

The Court: They will all be admitted.

(Plaintiff's Exhibits Nos. 4-C, 4-H, 4-K, and 4-L were then offered, marked and received in evidence.)

Q. (By Mr. Samuels): Would you just describe what those pictures are?

A. Exhibit No. 4-C is a photograph of the truck in question [23] astraddle this Kaiser sedan in front of the Glenwood Motors.

Q. That is the way the truck was when you saw it?

A. That is the way it would appear.

Q. Going through the other photographs quickly, officer, what are they?

A. Exhibit 4-K is the front end of the truck, evidently after it had been lifted off the Raish car.

Exhibit 4-H is the same just north of this, showing the underpass.

Exhibit 4-L shows the underpass looking at the scene of the accident from the north to the south through the underpass.

Mr. Samuels: No further questions.

#### Recross Examination

Q. (By Mr. Gearin): The damage that was sustained by the upper right hand corner of the truck when it came into contact with the underpass was just a little strip of metal that was torn off, wasn't it?



(Testimony of Eugene G. Hulett.)

A. There were a couple of pieces there.

Q. It was comparatively light metal?

A. Yes, aluminum is a light metal, yes.

Q. That could have been torn off quite easily by hitting the underpass?      A. Yes. [24]

Q. I assume that you looked for evidence of skidmarks behind the Los Angeles-Seattle Motor truck, is that right?      A. Yes, I did.

Q. And I take it you didn't find any?

A. I didn't.

#### Redirect Examination

Q. (By Mr. Samuels): Do you know, officer, as to how those trucks are constructed relative to the framework, what the framework is made of?

A. I believe it is metal.

Q. Was the metal on this truck bent, do you recall?      A. I don't recall.

Mr. Samuels: That is all.

Mr. Gearin: No further questions.

The Court: You are excused.

Witness excused.

The Court: This might be a good time to take a noon recess, and then we can come back at 1:00. It gives you an hour and ten minutes.

Ladies and gentlemen you are excused now until one o'clock. Please remember not to make up your mind until you have heard all the case.

Jury excused.

Out of the presence of the Jury. [25]

Mr. Gearin: At this time I would like to amend

the Defendant's contentions, adding a couple of subsections to Contention II, adding subparagraph VII, "The Defendant operated said truck at a time when the same was equipped without adequate or proper steering mechanism thereon."

The Court: All right. What is your reason?

Mr. Gearin: That is based on Mr. Embleton's testimony at the last trial.

Mr. Samuels: I object.

The Court: You may amend. Objection overruled. Mr. Samuels, do you have an amendment?

Mr. Samuels: We have two or three amendments we had agreed on. In number one, it has been agreed that Plaintiff's contentions might be amended to include the Plaintiff's list of exhibits to be amended to include the deposition of Dr. Howard Molter and the deposition of Leonard Jacobson. That Contention III may be amended to include the following injuries: a fracture of the right scapula and the phlebothrombosis of the leg. I believe Mr. Gearin and I have agreed on the testimony taken at the first trial, also we have a stipulation as to what the testimony of what Clyde M. Hugel would be. He is with the Interstate Commerce Commission. [26]

Mr. Gearin: Yes, we have a similar stipulation signed already. I would like to state Mr. Samuels and I have agreed that if Mr. Hugel, who is Interstate Commerce Commission Investigator, were here, he would testify as he did in accordance with transcript of the hearing at Eugene to the effect:

(1) That he found the broken pitcock at the point where the truck came to rest.

(2) Mr. Samuels may want to have his testimony regarding the tachograph and the speed.

The Court: Then all of his testimony doesn't go in?

Mr. Gearin: No.

The Court: Now will you state what you are stipulating to?

Mr. Gearin: The parties stipulate that if he were here, he would testify, as a result of his investigation, he found the broken pitcock at the front portion of the truck, where the front portion of the truck was when it came to rest.

The Court: Let's get it on a separate piece of paper and then we will read it to the Jury. Mr. Samuels, have you your changes in the Pretrial Order written out?

Mr. Samuels: I have them on my copy. [27]

The Court: Give them then to Mr. Bishop and he will make the changes.

We will recess now until 1 o'clock.

Noon recess.

Afternoon Session

Mr. Samuels: Call Mrs. Barnhardt.

GUELDA BARNHARDT

thereupon having been produced as a witness in behalf of the plaintiff, having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Samuels): Will you state your name to the Jury please?

(Testimony of Guelda Barnhardt.)

A. Guelda Barnhardt.

Q. Where do you live?

A. At Springfield, Oregon.

Q. What is your occupation?

A. Housewife.

Q. Did you have occasion on the seventeenth day of October, 1950, at shortly after 1 o'clock or thereabouts in the afternoon to be on or near the underpass where this accident happened?

A. I did.

Q. Were you in a car or driving a car at that time?      A. I was driving a car.

Q. Was there anybody with you? [28]

A. No, I was alone.

Q. Where were you going?

A. I was going north on highway 99. I was headed to Salem.

Q. You had come from home?

A. No, I had come from work.

Q. Do you recall the weather condition?

A. It was raining, I believe.

Q. Was the pavement wet?      A. Yes.

Q. Did you see a Los Angeles - Seattle Motor Express truck coming from the north?

A. Yes.

Q. At the underpass?      A. Yes.

Q. Were you moving or stopped at that time?

A. I was moving.

Q. In which direction were you traveling?

A. North.

Q. Had you reached the underpass yet or had you gone through it?      A. No.

(Testimony of Guelda Barnhardt.)

Q. You were south of the underpass, then?

A. Yes.

Q. About how far south of that were you when the truck came up to the underpass?

A. I don't remember exactly. I might have been several feet [29] or yards.

Q. Will you give me some estimate?

A. Two or 300 yards, I would say.

Q. Could you say the distance might compare with the length of this courtroom or compare to a block in the city?

A. There wasn't anything blocking my view; there was a Greyhound bus directly in front of me between me and the underpass, and it wouldn't have been any further than this courtroom from me.

Q. Do you think it could have been any further?      A. No.

Q. What was in front of you?

A. A Greyhound bus.

Q. Was anything else?

A. I don't remember any cars between me and it and between the Greyhound bus and the underpass.

Q. Could you see north beyond this bus?

A. Not directly in front of it, no.

Q. Could you see toward the right of it?

A. I could see to the left of it. I could see into the underpass, and there was this little red truck.

Q. Could you see the east half of the underpass—  
—I mean the west half?      A. Yes.



(Testimony of Guelda Barnhardt.)

Q. Could you see half of the road up there where the southbound traffic would go? [30]

A. I think so.

Q. Will you tell us about what speed in your estimation this truck was coming towards you? I am referring to the Los Angeles-Seattle Motor Express truck, Mrs. Burkhardt.

A. I would say about 25 miles per hour.

Q. Will you tell us what you saw there?

A. Well, I saw this Los Angeles-Seattle transport entering, I also saw the little red truck, which I saw was going into the underpass. I knew they couldn't both pass in the underpass because of the way the little red truck; the position the little red truck was in was what directed my attention to it, and I proceeded to stop.

Q. What happened?

A. About the next thing I saw was the piece of metal flying off the truck.

Q. Did you see the southbound truck collide with the underpass?

A. You mean the Los Angeles-Seattle truck?

Q. Yes.

A. I saw the piece of metal fly off the truck. I knew it had hit it.

Q. From which part of the truck?

A. At the top of the right hand corner of the truck somewhere up there, I didn't examine it closely.

Q. You mean the right hand corner as you face the front of the truck or the way the truck is going? [31]



(Testimony of Guelda Barnhardt.)

A. Well, it was going south. I would have been the right front of the truck.

Q. Its right front then?

A. Yes, on the bed of the trailer of the truck.

Q. Would it be the side of the truck by the edge of the road or the center of the road?

A. By the side of the underpass.

Q. What happened then?

A. I saw it go into the first car there and run into other cars.

Q. Did this truck, the southbound truck, the one that had the metal fly off of it, go straight or turn—what happened after it hit the underpass?

A. It went to the right some, although I wondered if it would come across the highway, but it kept to the right until it hit the first car and then some more.

Q. What happened to the first car?

A. Well, it just pushed it on into the other cars.

Q. Where did this car stop?

A. It was off the highway—I don't know. It was parked quite a few feet off the highway.

Q. It was completely stopped off the roadway?

A. Yes.

Q. Where was it parked, if you know? Where was it parked with relation to that roadway that comes in there from the west?

A. I don't remember exactly, although it seems to me it wasn't [32] too far from the underpass where it was parked.

Q. Is that the car that contained Mrs. Raish?

A. Yes.

(Testimony of Guelda Barnhardt.)

Q. This little pickup that you talked about, what did it do?

A. That was the last that I saw of it. After it was in the underpass and caused the large truck to hit the underpass and have metal fly off of it, I didn't see any more of the little red truck.

Q. It didn't stop?           A. No.

Q. Did you see the southbound truck, the Los Angeles-Seattle Motor Express truck when it hit the Raish car, did it climb up on the Raish car?

A. I don't know.

Q. You don't know that?           A. No.

Q. You mentioned that you were in some fear that the truck would come over to your side of the road. Did it start to turn towards your car?

A. No, but it happens so frequently when things like that happen, things go through your mind. I guess I didn't know what was going to happen. I knew something would happen, and I applied my brakes to stop.

Q. You were stopped when you saw most of this?           A. Yes. [33]

Mr. Samuels: You may cross examine.

#### Cross Examination

Q. (By Mr. Gearin): Mrs. Barnhardt, you have been requested to come to this trial on behalf of the Southern Pacific Company, too, haven't you?

A. Yes.

Q. When you saw the little red truck going into the underpass you knew at that time that something was going to happen, didn't you?

(Testimony of Guelda Barnhardt.)

A. That is right.

Q. And you could see part of the little red truck? A. Yes.

Q. And that was straddled over the center line, wasn't it? A. Yes.

Q. And you knew at that time there wasn't room between the front of the red truck and the side of the underpass for the Los Angeles-Seattle truck, didn't you? A. That is right.

Q. After the Los Angeles-Seattle truck collided with the underpass and you saw this aluminum metal or whatever it is, fly off, it continued directly to its right and to the Raish car and then on the other cars, didn't it? A. Yes.

Q. Did you notice that the speed decreased any when you watched [34] it?

A. I never particularly noticed that. He didn't have any control or couldn't have had much anyway.

Q. You have been on the highway and see these large trucks, haven't you? A. Yes.

Q. And vehicles with air brakes on them, haven't you? A. Yes.

Q. You are familiar with the hissing sound made when air brakes on the large trucks are applied? A. Yes.

Q. Did you hear that or any sound of that sort at that time? A. No, I didn't.

Mr. Gearin: That is all.

#### Redirect Examination

Q. (By Mr. Samuels): Was the window in your car open or closed?

(Testimony of Guelda Barnhardt.)

A. I couldn't tell you that, I don't remember.

Q. It has been quite awhile since this accident, hasn't it?      A. Yes.

Mr. Samuels: Nothing further.

Mr. Gearin: Nothing further.

The Court: Witness excused.

Witness excused. [35]

Mr. Samuels: Call Mr. Stone.

O. L. STONE

thereupon being produced as a witness in behalf of the Plaintiff, having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Samuels): Will you state your name to the Jury, please?      A. O. L. Stone.

Q. Where do you live, Mr. Stone?

A. At Eugene, Oregon.

Q. How long have you lived there?

A. Fifteen years.

Q. What is your age?

A. 58 years of age.

Q. And your occupation?

A. I am a bus driver for Greyhound.

Q. How long have you driven busses?

A. Since 1928.

Q. Has that been continuously?

A. Yes sir.

Q. Has that driving been both city driving and out in the country throughout this vicinity?

A. Yes, that is right. [36]

(Testimony of O. L. Stone.)

Q. Did you have occasion to be near the scene of this accident that we are talking about here?

A. I was there, yes.

Q. Do you recall the weather conditions on the day of this accident?           A. It was raining.

Q. About what time of the day did the accident happen, if you remember?

A. Approximately at 1:30.

Q. In the afternoon?

A. Yes, in the p.m.

Q. Where were you going at that time?

A. Eugene was my destination.

Q. You had been driving from where?

A. From Medford.

Q. When the accident happened, where were you located?

A. Off the right shoulder of the paved portion of the road, northbound.

Q. That would be on highway 99?

A. Yes.

Q. Where were you with respect to this underpass that we are talking about?

A. Approximately 150 feet south of it.

Q. You had been going north, is that correct?

A. Yes. [37]

Q. Did I ask you as to the weather conditions?

A. Yes sir.

Q. Did you see a Los Angeles-Seattle truck southbound before it reached the underpass?

A. Not before it reached the underpass.

Q. When did you first see the truck?



(Testimony of O. L. Stone.)

A. When it started to go through the underpass.

Q. At that time were you moving or were you stopped?      A. I was moving.

Q. How fast were you going?

A. Approximately 25 miles per hour.

Q. Do you have any estimate as to the speed, the miles per hour, of the Los Angeles-Seattle truck driver?

A. I would say his speed was about 25 miles per hour.

Q. About 25 miles per hour?      A. Yes sir.

Q. What happened then?

A. Well, as he came through the underpass, the upper right hand corner of his truck caught on something on the underpass as he came through.

Q. Did you see a red truck there northbound?

A. I didn't.

Q. So there isn't any question in the Jury's mind, by the upper right hand corner of the truck coming toward you, would it be on the left or the right? [38]

A. It would be on my left, his right.

Q. Going south, it would be on the side where the edge of the pavement was on his side of the road?      A. That is right.

Q. Do you know what part of the truck came into collision with?

A. A diagonal piece of the brace under the underpass.

Q. Was that brace on the north or south side of the underpass?      A. The south side.



(Testimony of O. L. Stone.)

Q. Did some of the metal stick to that brace of the underpass?

A. I didn't know it at the time. I saw it afterwards.

Q. Is that what is shown in one of the pictures we have here?      A. It is.

Q. Will you tell the Jury as to whether or not when the truck came through there, as part of the truck struck the underpass, which part of the truck came into collision with the brace?

A. I don't believe I understand the question.

Q. Well, the part that came into collision with the brace that is located about how far back from the front bumper of the truck, if you know?

A. Well, it must be 6 or 8 feet.

Q. And the part ahead of that, the body came through without having any trouble?

A. It did.

Q. There was no collision before it hit the upper crossbeam of the underpass?

A. I didn't see any. [39]

Q. What happened then after the accident?

A. It tipped over to the left and after that I don't know what happened until it came to rest.

Q. Did you follow the course of it with your eyes?      A. No.

Q. What were you doing at that time?

A. Getting the bus in the clear and stopped at the side of the road.

Q. What was the next thing that you saw?

A. After I got stopped, I looked over and the truck had come to rest.

(Testimony of O. L. Stone.)

Q. Will you describe where it was in relation to the other cars and with respect to the underpass?

A. Well, it was around 50 to 60 feet, maybe 100 feet beyond the underpass off the side of the road and on top of a car. This car was folded there under it.

Q. Were there other cars there ahead of it then?

A. Yes.

Q. Do you know whether or not the southbound truck went on top of this car before it reached the place where it had stopped?

A. No, I wouldn't know that, no.

Q. Where was this car containing Mrs. Raish stopped?

A. You want that before the collision or afterwards?

Q. Before the collision?

A. I didn't see it before the collision. [40]

Q. Did you see any other vehicle in the underpass when the southbound truck went through?

A. No, I didn't.

Q. Were you hesitating or did you slow down or stop to let the other truck go ahead of you?

A. I had slowed down.

Q. For what reason?

A. I don't like to pass in that underpass with another vehicle.

Q. What was the reason? Ordinarily busses pass there all right, don't they?      A. Yes.

Q. Why didn't you want to pass him in there?

Mr. Gearin: We object to that, Your Honor. He said he didn't pass them because he didn't want to.

(Testimony of O. L. Stone.)

The Court: Objection sustained.

Mr. Samuels: Nothing further.

Cross Examination

Q. (By Mr. Gearin): Mr. Stone, you heard the police officer testify this morning concerning his measurements, didn't you?      A. Yes sir.

Q. And I believe he stated that he measured the distance from the south part of the underpass to where the rear axle of the [41] truck was—that distance was 177 feet 4 inches, and that from the front part of the truck to the underpass was a distance of 215 feet—when you say the truck was about 100 feet from the underpass, you didn't measure that, did you?      A. I didn't, no.

Q. You would say that would be more or less a guess?      A. Yes, strictly.

Q. You have been driving highway equipment for a long time?

A. Yes, it has been a long time.

Q. As a Greyhound Bus driver you have had to pass a physical examination, including an examination of your eyes, haven't you?

A. Yes sir.

Q. And you are trained as a lot of drivers are, aren't you?      A. Yes.

Q. It is your duty to keep a close lookout for the traffic ahead of you, isn't it?      A. Yes.

Q. And I assume you were keeping such a lookout as you approached this underpass, weren't you?

A. I was.

(Testimony of O. L. Stone.)

Q. And there was no cause in your mind for this accident, after all there was no little red truck there; you observed none, did you?

A. I didn't see any. [42]

Mr. Gearin: That is all.

#### Redirect Examination

Q. (By Mr. Samuels): As this southbound truck came towards you, could you tell whether or not its right wheels were on the shoulder or on the pavement edge?

A. I wasn't watching that part of it.

Mr. Samuels: That is all.

Mr. Gearin: That is all.

The Court: Witness excused.

Witness excused.

Mr. Samuels: Call Mr. Thomas Embleton.

#### THOMAS IVISIN EMBLETON

thereupon being produced as a witness in behalf of the plaintiff, having been duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Samuels): Will you state your name, please? A. Thomas Ivisin Embleton.

Q. Where do you live?

A. Oak Arbor, Washington.

Q. And your age? A. I am 40. [43]

Q. Are you married? A. Yes sir.

Q. What is your occupation?

(Testimony of Thomas Ivisin Embleton.)

A. Truck driver.

Q. By whom are you employed?

A. By the Los Angeles-Seattle Motor Express Truck Company.

Q. How long have you been driving a truck?

A. Approximately 20 years.

Q. Have you worked for other companies besides this one?      A. I have.

Q. Has your experience been with every type of truck equipment, heavy and light equipment?

A. All heavy trucks and busses.

Q. Has that been continuous for the past 20 years?      A. Yes.

Q. On the day of this accident, Mr. Embleton, where was the place from where you left?

A. Seattle, Washington.

Q. And where were you bound for?

A. We were bound for San Francisco.

Q. You say, "we", was there somebody else with you?

A. There are two drivers on all our trucks. The other driver was driving when we left Seattle.

Q. At the time of the accident, where was he?

A. He was in the sleeper.

Q. Where is that on the truck? [44]

A. That is located right behind the cab in the bed of the truck.

Q. The relief driver was sleeping during the time the truck was moving?

A. Yes, we worked an eight hour shift.

Q. You left Seattle that day about what time?



(Testimony of Thomas Ivisin Embleton.)

A. Approximately 4 o'clock in the morning.

Q. And who was driving at that time?

A. The other driver, M. E. Palmer, Melford E. Palmer.

Q. How far did he drive that day?

A. To Woodland, Washington.

Q. Did you stop there?

A. Yes, he stopped and woke me up.

Q. Did you take over from that place?

A. Yes, I did.

Q. And you drove to the place where this accident happened?      A. Yes.

Q. Was it necessary to apply brakes to your truck numerous times?

A. Numerous times, yes.

Q. Were there any holes in your brake linings then?

A. I didn't know of anything; they worked all right.

Q. Did you bring the truck to a stop at the Springfield Junction which is just a few hundred feet on east from where the accident happened?

A. I observed the braking equipment two or three times as there [45] are four or five stoplights at the junctions all along coming through Eugene.

Q. Did you have any trouble with your braking equipment then?      A. No.

Q. Any trouble with your starting equipment?

A. No.

Q. Did you make a stop at Woodland, Washington, where you had your transmission lever fixed?      A. Yes.



(Testimony of Thomas Ivisin Embleton.)

Q. Would that have anything to do with the starting equipment or the braking equipment?

A. That would have nothing to do with the starting or braking equipment.

Q. What were the weather conditions at the time of the accident?

A. It would rain intermittently; stop for a few minutes, then rain, then stop, then rain again.

Q. Will you tell the Jury how the braking systems on truck work when it is raining—I am referring to the application of the brake linings to the brake drums?

A. Well, the brakes on a truck are not exactly like the brakes on an automobile. Your drum on an automobile is entirely closed, but the truck brake, as I said before, the shoes—we have 4 inch shoes in back, that is a shoe that is 4 inches wide, and they are about a 14 or 16 inch brake cylinder. On the big trailers, it is 18 to 20 inches. Of course, when the brakes are not applied for [46] some time, it works like a car when the shoe hits the drum and when we release it, the brake comes free.

Q. Isn't it a fact that water gets into the brakes, making the efficiency of them vary?

A. It makes some difference in due course of time, if you travel quite a distance without applying the brakes, the revolution of your axle has the tendency to pick up water, as everyone knows. When you see a truck or car, you can notice the tires slapping on the pavement pick up water. That is also true of the truck, and water gets in behind

(Testimony of Thomas Ivisin Embleton.)

there and naturally this water, grit, sand, and what have you gets on the brake drums and without any use of the brake drums or any use of the air against the brake drum for quite a little while, will have the tendency to open up the line somewhat, and after that you cannot expect to get the proper braking efficiency when your brakes have to be applied. Sometimes the lines dries up on you.

Q. Is that something every driver of a truck is faced with—the brakes on every truck are fixed like that?      A. Yes.

Q. Is that standard operating equipment?

A. Yes.

Q. Just prior to the time of this accident, approximately how long was it before that you had used your brakes?

A. It was just around the corner, a few hundred feet from where the accident happened. I had to stop for a red light. [47]

Q. Did they work then all right?      A. Yes.

Q. Going back to the approach where this accident happened, is it a straight or crooked highway as you approach this underpass?

A. It is straight for about 800 feet.

Q. What did you say, is it about 800 feet beyond the underpass that it is straight?      A. Yes.

Q. Is that where you made your last stop?

A. Yes.

Q. How fast as to speed were you driving?

A. Approximately 30 miles per hour.

Q. What was the weight of your vehicle loaded?

A. As near as I can tell, 72,000 pounds.

(Testimony of Thomas Ivisin Embleton.)

Q. Is that normal weight.

A. That was at that time, the total weight by law. Of course, it is 76,000 now.

Q. Will you tell us what happened?

A. Well, just as I was entering the underpass, I noticed this red truck that had already started to enter the underpass going the other way. As I started through, I noticed he was quite aways over in my lane, and I said to myself, he is not giving me much room. So I swerved over to my right to avoid a collision and just about that time there was a crunch.

Q. What was that crunch, did you find out later? [48]

A. Well, at that time, I didn't have any way of knowing.

Q. What was it that you found out later?

A. It was the right top part of the truck body that had collided with the beam on the underpass.

Q. One of the crossbeams or one going up and down? A. It was the angling beam.

Q. What was the height of your truck?

A. About 12 feet 3 inches.

Q. And the width? A. 8 feet.

Q. Now have you gone through that underpass before with other trucks being in there?

A. On numerous times.

Q. Are you able to go through there without reducing speed?

A. Well, you can't go through there 50 miles per hour, but a person can go through there using due caution.

(Testimony of Thomas Ivisin Embleton.)

Q. About how much space is there between the trucks if there are two trucks of the size of the one you were driving going through there?

A. Oh, about 4 inches.

Q. Four inches to spare? A. Yes.

Q. As you mentioned, you swerved over and then there was a crunch—about how far over do you think you swerved?

A. About 14 or 16 inches. [49]

Q. Were you about that far from the yellow center line? A. Yes.

Q. And did any part of your vehicle come out without having a collision with the crossbeam?

A. Come again?

Q. The part of the truck that came in collision with the crossbeam, is that part way back on the truck bed?

A. It is located about 5 feet back from the very front of the vehicle.

Q. Did the truck part of the car come through without any collision? A. It did.

Q. Did it strike any portion of the bridge construction? A. No.

Q. Was there any collision with anything except the right upper corner of the truck?

A. There wasn't indication of it.

Q. What was the construction of the framework of that body—I am calling your attention to the part where the aluminum paint was?

A. The body itself was made of manganese

(Testimony of Thomas Ivisin Embleton.)

aluminum. That is a very light aluminum alloy mixed with manganese for strength.

Q. Referring to the covering or skin, that is aluminum, isn't it?

A. Yes, it is about  $\frac{3}{8}$ " thick and would take quite a bump to [50] do any damage to that.

Q. Is that fixed to any part of the framework of the truck body?

A. It is riveted to the framework of the truck body.

Q. On the framework on the inside of it?

A. Yes.

Q. When this crunch happened, when the upper right part of the truck collided with the crossbeam, what happened to the truck?

A. Well, it lurched to the left.

Q. Then what happened, then what did you do?

A. Well, it lurched off to the other side, it lurched to the left toward the oncoming traffic which were a car and a Greyhound Bus and some other traffic on behind, and I didn't want to hit that bus so I pulled the wheel around hard to the right and as I brought it around to the right, I noticed that there was a light tan automobile sitting there right off the edge of the road. I started to turn the steering wheel to avoid a collision with that car—I didn't have time and I saw then that I was going to hit the car and I said to myself, "I hope there isn't anybody in that car." Of course, it came up to the back end of this car and in the meantime I was still trying to bring the truck back up on the highway. Well, nothing happened, the impact of



(Testimony of Thomas Ivisin Embleton.)

the car impaired the steering mechanism so I couldn't get it to work, and in the meantime, I thought it was funny that I wasn't slowing down at all. Later I found that [51] during the course of the time this was happening, the pitcock on the airbrakes had gotten knocked off and I had no brakes.

Q. Where was this pitcock located?

A. Well, as Mr. Hugel told me—he is the commissioner——

Q. No, I am referring to where it is located on the truck?

A. It is located on the bottom of the air tank, that is the storage tank for the purpose of working the braking system, just forward of the rear wheels on the truck. That would be on my right hand side.

Q. What is its function?

A. You mean the tank?

Q. Yes.

A. It is storage for air for application to the brakes.

Q. Suppose the pitcock is knocked off that type of tank, what is the result on the braking system?

Mr. Gearin: We object to that, Your Honor, unless there is some previous testimony that it was broken off. If Mr. Samuels intends to tie it up to something like that, I don't care about it.

Mr. Samuels: I think he testified that it was knocked off, unless I misunderstood him.

Mr. Gearin: I may be mistaken on that, Your Honor.



(Testimony of Thomas Ivisin Embleton.)

Mr. Samuels: He testified that it was knocked off, as I understand it from his previous [52] statement that the pitcock was found near the place where the truck finally came to rest.

Mr. Gearin: That is my understanding of the situation. I withdraw my objection.

A. (By Mr. Samuels): What was the question?

Q. The question was—if the pitcock was knocked off on that type of braking equipment, what was the result from the efficiency of the brakes?

A. You would have no brakes.

Q. They would not hold? A. No.

Q. Could you clarify that to the Jury. Tell the Jury what that tank does back there?

A. To the best of my ability—of course, I will have to start at the very beginning. For this purpose there is mounted on the front end of the truck, what we call an air compressor, the same nature as the kind you find in service stations for pumping up the tires. This compressor is of that type. There is a line that runs back to a tank on the left side of the truck, what we call a wet tank. The purpose of that tank is to take out all the impurities that is thrown into the compressor out of the air before it is put into the storage tank. And of course, from that wet tank the air goes through another line into the storage tank where it is stored until an application of the [53] brake is required.

Q. If you lose pressure on your system, will the brakes apply? A. No.

Q. Had you applied the brakes and attempted to stop the vehicle shortly before the accident?

(Testimony of Thomas Ivisin Embleton.)

A. Yes. ?

Q. After the collision with the underpass?

A. Yes.

Q. Did they work?

A. That I couldn't say, I was wondering why I wasn't stopping any or slowing down.

Q. Did you apply them before the collision with the car containing Mrs. Raish?

A. Yes, I did, just prior to entering the underpass a little.

Q. I mean after you had hit the underpass before you hit her car? Had you applied your brakes then?

A. I had my foot on the brakes all that time.

Q. At the same time as you were trying to regain control of your vehicle? A. Yes.

Q. And they worked all right just before you went through the underpass, didn't they?

A. They did.

Mr. Samuels: May I see those photographs?

Q. I am handing you Plaintiff's Exhibit No. 4-A and 4-B and call [54] your attention to the crossbeam there, and I will ask you if you know what that piece of metal is that is on the crossbeam up against there?

A. Well, this is Exhibit No. 4-B, and that is a piece of metal that is hanging on that little ladder—that is the strip that I had left there, that is the strip off my truck bed.

Q. That came off your truck?

A. It is the same.

(Testimony of Thomas Ivisin Embleton.)

Q. Is that the crossbeam you refer to as causing the collision with your vehicle?

A. It is.

Q. I will hand you Exhibit No. 4-K, and ask you if that is a correct picture of the truck as it was following the accident?      A. Yes, it is.

Mr. Samuels: No further questions.

Cross Examination

Q. (By Mr. Gearin): Mr. Embleton, how long did you stop at Woodland, Washington, to have your truck fixed?

A. Well, in the neighborhood of 45 minutes, I would say.

Q. Had you made up that time by the time you got to Eugene?      A. Pardon me?

Q. Had you made up that time?

A. Implying what?

Q. I will ask another question—were you behind time as you got [55] to Eugene.

A. We don't have any set schedule. I don't operate on a bus schedule.

Q. In other words your employer doesn't care when you get to San Francisco, is that right?

A. No, it doesn't really make too much difference, a matter of a few hours. If we are way off on the way, we usually send them a wire informing them the approximate time we will arrive there.

Q. Then it isn't a fact that you were trying to make up lost time as you were going down the Willamette Valley, is it?      A. No.

Q. Your brake drums are open, aren't they?

(Testimony of Thomas Ivisin Embleton.)

A. Yes.

Q. Do you know any reason why a big brake drum can't be enclosed like it is on a passenger car?

A. No.

Q. As you went along there, when was the last time you put your foot on the brakes, was it within 100 feet of the underpass or when the red truck appeared did you put your foot on the brakes then?

A. I wouldn't say 100 feet away.

Q. A thousand feet away?

A. I wouldn't say that.

Q. When you stopped up at the "Y", were your brakes working all right? [56]

A. Yes.

Q. You stopped up at the "Y"?

A. I did.

Q. By going this 800 or 1000 feet without putting your feet on the brakes, would that make enough water so that the brakes wouldn't hold?

A. I just got through stating that I had the brakes down a little just before entering the underpass.

Q. How fast were you going before you braked it down?

A. I wasn't watching the speedometer. I was watching the road.

Q. You have driven trucks for a good many years?

A. Yes.

Q. You can drive and know how fast you were going without watching the speedometer, can't you?

A. Approximately.

Q. Approximately how fast were you going before you braked it down and before you went under the underpass?

(Testimony of Thomas Ivisin Embleton.)

A. Approximately 30 miles per hour.

Q. After you braked it down, how fast did you go then?      A. I didn't notice.

Q. What were you paying attention to?

A. I was watching the underpass.

Q. And there was nothing in the underpass?

A. Well, at the time after I hit the brakes, there was this little red truck. [57]

Q. I see, and that is more or less level under the underpass—the pavement is more or less level there?      A. More or less.

Q. When you are north of the underpass 200 or 300 feet, can you see under the underpass and see the highway beyond for 200 or 300 feet—can you see the highway beyond. There are no side roads to your left from the east on the other side of the underpass there, are there, but there is one to the right where Mrs. Raish was, isn't there?

A. Yes.

Q. There is none to the east, is there?

A. No, but there are some business houses out there where a lot of cars go in and out.

Q. You could see as you approached the underpass, you could see the bus stopped there on the other side, couldn't you?

A. I noticed the bus and a few cars on the other side, yes.

Q. You were keeping a lookout ahead of you?

A. Yes.

Q. All your concentration was centered on the lookout ahead of you?      A. Yes.



(Testimony of Thomas Ivisin Embleton.)

Q. Can you tell the Jury where the red truck came from?      A. No, I can't.

Q. The first time you saw the red truck was when you were entering the underpass from one side and he was entering the underpass [58] from the other side?      A. That is correct.

Q. As shown in one of the pictures there, Mr. Embleton, the part of the truck that was torn off was just a thin piece of metal that was torn off on the right hand corner, just the skin of the truck, is that right?

A. It wasn't the skin; it was a piece of metal about  $\frac{3}{8}$ " thick. As you can tell, it is separate there; it is reinforced there for the corner, and it is a separate part of the top. That is what is ripped away, the upper part of the body.

Q. Did you see that piece yourself?

A. Later on, I saw it myself.

Q. When was this?

A. Well, I walked back—I looked at it when it was sent to Cummings Truck Service down there at Eugene.

Q. You say the impact of your truck and the underpass lunched you to the left toward the center lane? Did you lurch toward the center line?

A. It did.

Q. You didn't cross the center line?

A. I was too busy, I didn't notice, but I didn't go very far over there.

Q. You were able to turn the truck all right?

A. Yes, I did.



(Testimony of Thomas Ivisin Embleton.)

Q. Will you tell the Jury why you couldn't turn to the left again when you knew you were going to hit Mrs. Raish's car? [59]

A. As far as I know, I would say my steering mechanism was impaired.

Q. That is the best of your recollection?

A. Yes.

Q. That is your testimony? A. Yes.

Q. Since the last hearing in this case on January 23 and 24 of this year, Mr. Embleton, have you discussed the matter of your testimony with anybody representing your employer, the Los Angeles-Seattle Motor Express Company, Inc.?

A. I discussed some with Mr. Samuels and Mr. Vergeers.

Q. Did you go over your transcript of your testimony from that trial? A. Just slightly.

Q. You live up at Island County, Washington?

A. Yes.

Q. Now when you saw the red truck, you immediately put on your brakes?

A. Well, no, I said I put on my brakes just before we got into the underpass.

Q. Was that before or after you saw the red truck? A. It was about simultaneously.

Q. Did you keep your foot on the brakes all the time thereafter?

A. Well, about the same time that I put my foot on the brakes the accident occurred. [60]

Q. Well, now, had the accident occurred when the front of your truck was about 5 feet out of the underpass, had it?

(Testimony of Thomas Ivisin Embleton.)

A. You are not taking into consideration the reaction and whatnots.

Q. What are the "whatnots" that I am not taking into consideration?

A. Well, from the first time that you step on this brake pedal to—the air gets picked up through the diameters, or whatever you call it, to make the brakes contact with the brake drums.

Q. You misunderstood my question then Mr. Embleton. Did you see the red truck before you got to the underpass?

A. No, about halfway between the curve and the underpass I met a big truck with a low bed on it and a caterpillar tractor on it, then I slowed down and I saw this other traffic which I thought was stopped. I slowed down, it was going so slow. I waited for the truck with the 10 inch blade to come through the underpass, but I didn't notice this other truck until I got up right to it and started through the underpass. Then I saw this red truck; It just seemed to come from nowhere.

Q. Is it a fair statement that you were just entering the underpass when you saw the red truck, or did it happen so quickly you don't remember?

A. Well, I wasn't more than 20 or 30 feet through it.

Q. Well, you said that you applied your brakes about the same time as you saw the red truck, isn't that correct? [61]

A. Yes, that is correct.

Q. Did you keep your foot on the brakes till afterwards and didn't let up the brakes at all?

(Testimony of Thomas Ivisin Embleton.)

A. No, to my knowledge I was pretty busy.

Q. You didn't put your foot on the gas?

A. No.

Q. Do you recall your deposition taken at the Island County Courthouse at Coupeville, Washington, on January 10 of this year?

A. I recall I gave one, yes.

Mr. Gearin: I wonder if the original deposition could be handed to the witness.

(The original deposition was then handed to the witness.)

Q. I will refer, Mr. Embleton, to page 36 of your deposition, the second question on that page beginning at line 9, and I will ask you if you did not give these answers to these questions:

“Q. When did you first apply your brakes?”

“A. Well, as soon as the impact took place.

“Q. Did you apply your brakes at all when you first saw this red truck?”

“A. A little before, and then I left my foot off the brake a little, and eased over, and kind of stepped on the throttle a little, you see, to give me momentum, and then I heard this awful crunch, and of course [62] the truck lurched, and I jammed on the brakes when I started shooting out, you know, in the other lane of traffic.

“Q. Did you feel your truck skid when you jammed on the brakes?”

“No. Things were happening too fast. I would not say—I didn't have time to do any feeling.”

(Testimony of Thomas Ivisin Embleton.)

Q. That was your testimony taken on January 10 of this year?

A. I did give that testimony.

Q. What is the fact, Mr. Embleton, as to when you first applied your brakes—was it before or after you saw the red truck?

A. Well, I applied them several times previously, but just what are you trying to get at?

Q. Well, I am asking you with reference to the time that you saw the red truck. Did you put your brakes on before that time or after that time?

A. I put them on just before entering the underpass.

Q. When you put your foot on the throttle——

Mr. Gearin: I wouldn't bother about reading that deposition, Mr. Embleton. I just want your best recollection at this time.

The Witness: I wasn't reading it; I was just trying to picture it.

Mr. Gearin: The only thing we want is your best recollection now. [63]

The Witness: I was just trying to picture the happening down there.

Q. Let me ask you another question then. As far as you now know and remember, Mr. Embleton, about the time you went under the underpass, you had put your brakes on—is that a fair statement of the fact?

A. That is a fair statement, yes.

Q. And at that time the brakes would not work?

A. They did work.

(Testimony of Thomas Ivisin Embleton.)

Q. When?

A. Before I went into the underpass.

Q. Before you went into the underpass?

A. Yes.

Q. When didn't they work?

A. Well, I said, I wondered why they were not working after the accident occurred.

Q. Now, do you recall your testimony given in this court on January 23 of this year—page 32—the question is,

“Q. As far as you remember when you went into the underpass you put on your brakes, didn't you?      “A. Yes.

“Q. At that time the brakes did not work, did they?

“A. It would be pretty hard to say whether they worked or not, right this minute.”

Q. (Continued) This was your testimony in this courtroom at [64] that time? You gave that testimony, didn't you?      A. Yes, I did.

Mr. Samuels: That isn't complete, you should go into the next question or two, Mr. Gearin.

Mr. Gearin. All right.

Q. Then there were these questions and answers:

“Q. Do you have airbrakes on the 20 wheels of your truck?      “A. Yes sir.

“Q. Each one of the 20 tires?      “A. Yes.

“Q. Each one of the tires is 8 inches wide on the pavement, is it not?

“A. I never measured it.

“Q. But it is approximately that?



(Testimony of Thomas Ivisin Embleton.)

“A. I would say that.”

Q. (Continued) You gave those answers in response to those questions in this courtroom at that time?      A. Yes.

Q. Of course, it takes sometimes for the air to reach—to go through the air lines, after you put your brakes on, doesn't it?      A. Yes, it does.

Q. What was the speed of your truck as you were going under the underpass?

A. That I wouldn't say. [65]

Q. Do you recall your discussion with Officer Hulett?      A. I recall talking to him.

Q. Do you recall telling him that your speed was between 30 and 35 miles per hour?

A. That was prior to the time I reached the underpass. I also told him I was sure that my speed was between 30 and 35.

Q. You are not sure now of your speed, are you?

A. Well, now later the tachograph indicated my highest speed was 28 miles per hour. That could have happened when the truck hit the underpass and the rear wheels were off the ground.

Q. Do you know that the rear wheels were raised off the ground?      A. Yes, sure.

Q. You could feel that?      A. Yes.

Q. I don't want to appear to be badgering you, but could you tell the Jury whether or not you did have your brakes applied before you struck the underpass—what can you say about that?

A. I have already told you once—I let my foot

(Testimony of Thomas Ivisin Embleton.)

off the brakes and stepped on the throttle again. We have a series of gears, at that time I wasn't in the first gear. You have to understand that. I think I was about third over maximum speed, and if you crowd it, and I mean crowd it, you might be able to possibly make it do 35 miles per hour, possibly that is.

Q. Mr. Embleton, after you had struck the underpass, you then put on your brake? [66]

A. I did.

Q. After that time, or at any time thereafter, did your truck slow down or respond to your brakes?

A. Well, I was wondering why I wasn't slowing down faster than I did, yes.

Q. Your brake drums had water on them as you went under the underpass?

A. I don't know, but I didn't see, like I said, why I didn't slow down. As I said at the previous hearing, there is always a possibility.

Q. Referring to your testimony on page 36, the first question on that page:

“Q. Is it your testimony that your brake drums had water in them as you went under the overpass?”

“A. They did.”

Q. Is that what your testimony is now?

A. They did, they would have to have some water in them.

Q. Now are you sure that your truck did not hold 73,193 pounds gross weight at that time?

(Testimony of Thomas Ivisin Embleton.)

A. I don't know; I didn't notice.

Q. Now this was about your fifth trip under this underpass for this particular rig, wasn't it?

A. It was.

Q. For how long had you driven this type of equipment under this underpass? [67]

A. This type of equipment was new, fairly new; the company was changing from what it did have, the regular conventional trucks. They were buying up these new ones.

Q. This particular type built truck was called a cab-over?      A. Yes.

Q. You had driven this rig about five times?

A. Correct.

Q. You had never had any difficulty before?

A. No, never before.

Q. You have driven this route up and down the coast for a good many years, haven't you?

A. Yes.

Q. You have driven higher rigs under this underpass, haven't you?      A. Yes.

Q. How did you manage with them?

A. Well, you have to slow down and go very slowly to get through with a higher rig. You have to go very slowly.

Q. All the trucks that are the same general height as the one you were driving—you had been able to go through with them under the underpass with the same speed before, hadn't you?

(Testimony of Thomas Ivisin Embleton.)

A. I had.

Q. This red truck was about a foot over the yellow line, was it not?

A. As near as I can remember, yes. [68]

Q. Do you remember making a statement to—Mr. Jack Spencer, the Deputy District Attorney for Lane County, right after the accident?

A. Yes.

Q. I will ask you, if at that time, you didn't answer a question given to you. I am referring to Defendant's Pre-Trial Exhibit No. 61,—if he didn't ask you this question?

“Q. Do you mean by that he was driving in your lane of traffic? Or over the yellow line?”

“A. I do not believe there is a yellow line. He was driving just over too far, I would say practically straddling the center of the road. I was just in the act of stepping on the brake; I eased it over, stepped on the brake and about that time the truck came up toward the side, and I heard a bump.”

Q. Did you make that statement to Mr. Spencer?

A. I did.

Q. To refresh your memory isn't it a fact that the red truck was just about straddling the center of the highway, as you can now best remember—that is a fair statement, isn't it?

A. Well, it was, to the best of my knowledge and recollection. He was over in my lane of traffic.

Q. Whether or not he was a foot or straddling the center of the road, you don't remember now, do you?

A. I wouldn't say a foot or 14 inches or 16

(Testimony of Thomas Ivisin Embleton.)

Q. You don't remember it in feet now, do you?

A. Pardon me.

Q. I was going to say you don't remember now whether he was even with the center line or far over it or straddled the center line, do you?

A. What do you mean by straddled, going down the center of the highway?

Q. Yes. A. No, he wasn't.

Q. Do you have a speedometer in your truck—you do, don't you? A. Yes.

Q. Now, I think you have stated it before, Mr. Embleton, that there is ample room in the underpass if both vehicles will keep on their own side of the center of the underpass, isn't that right?

A. I said there is room to go in there, yes.

Q. There is room to get by? A. Yes.

Q. You have passed trucks under the underpass before, haven't you? A. Yes.

Q. To get back to the red truck, if the red truck hadn't crowded you over there, there wouldn't have been an accident, would there?

A. Well, hardly. [70]

Q. You don't believe so?

A. I don't believe so.

Q. You don't know when this pitcock broke off, do you? A. No.

Q. It could have been broken off when the cars came to rest at the telephone pole in front of the autowreckers, couldn't it?

A. No, I hardly think so, because it was found 12 or 14 feet behind, if I remember correctly.



(Testimony of Thomas Ivisin Embleton.)

Q. Did you see it there?

A. No, Mr. Hugel of the I.C.C. picked it up.

Q. That is what he told you? A. Yes.

Mr. Gearin: I move to strike the testimony of the witness as to the information he received from someone else and ask the Jury to be instructed to disregard it.

The Court: That is right.

Ladies and Gentlemen of the Jury, with reference to any testimony about his statement as to the pitcock being 12 or 14 feet behind where the truck came to rest, you are instructed to disregard that testimony.

Q. (By Mr. Gearin): You don't know exactly where the truck was when the brakes went out, do you? [71] A. No, I don't.

Q. You had some trouble with the steering of your truck, as I understand it?

A. Well, after the impact, yes.

Q. The only part of your truck that came into contact with the underpass was the upper right corner wasn't it? A. Yes.

Q. Could your steering difficulty be caused by the wet pavement or gravel on the road, rather than something wrong with the steering mechanism?

A. No.

Q. Getting back to your testimony of January 23, I will ask you if you didn't make these answers to these questions:

This is on page 44 of the transcript:

(Testimony of Thomas Ivisin Embleton.)

“Q. Did you attempt to avoid the collision by going to the left?

“A. I did, but it didn’t do any good.

“Q. Why?

“A. Something was wrong with my truck.

“Q. Something was wrong with your truck?

“A. The wheels couldn’t turn. This could have been due to a wet pan or a little bit of gravel on the drum or something wrong with the steering mechanism.”

Q. Did you give us that testimony then?

A. Well, it is all right, down to a certain part. I don’t recall [72] anything about a wet pan on the truck. I don’t know what that would have to do with the wheels.

Q. You don’t recall that testimony then?

A. No, as far as the pan, I don’t know where a pan would fit in. Someone has just misconstrued what I said.

Q. Can you give us any explanation now of why your truck would not respond when you tried to turn it to the left?      A. No, I can’t.

Mr. Gearin: Now, that is all.

The Court: Looking at this answer to this question in the transcript of the former trial, I think the word should be pavement instead of pan. It was due to wet pavement, not a wet pan.

Mr. Gearin: I was in doubt about it myself, so I didn’t pursue it any further. I knew the word pan didn’t fit in. It was wet pavement, that should be the correct word there.

(Testimony of Thomas Ivisin Embleton.)

### Redirect Examination

Q. (By Mr. Samuels): Did your truck come into contact with this red truck?

A. No, it didn't.

Q. Mr. Embleton, are there very many trucks similar to the kind you were driving on the highways, using this highway?

A. Oh, I would say they run into the thousands.

Q. Do you know if there are trucks in Oregon comparable with that one that go through there?

A. Yes.

Q. Was there anything unusual about the one that you were driving.

A. Not particularly.

Q. Was there anything unusual about it as to its size?

A. No, nothing unusual. It was 60 feet long. I don't recall the height.

Q. Sixty feet long?                      A. Yes sir.

Q. Was this truck that you were driving equipped with the tachograph which we have introduced into evidence here?                      A. It was.

Q. And you occasionally passed other trucks while in the underpass or overpass down there?

A. I have met other trucks in it, yes.

Q. If you do pass other trucks in there, what is the usual clearance you are able to get between vehicles?

A. Oh, possibly four inches.

Mr. Samuels: That is all.

Mr. Gearin: That is all.

The Court: You are excused, Mr. Embleton.

Mr. Samuels: I would like to ask Mr. Embleton to remain, as we may want him for further questions. [74]

The Court: Please remain in the courtroom today and tomorrow, Mr. Embleton.

Mr. Samuels: We would like at this time to read the deposition of Dr. Howard A. Molter. His testimony was taken by deposition at Eugene, Oregon.

The Court: Don't you think it would be better to call the Plaintiff, so that you would have a foundation laid for some of the questions, as to the physical disability of the Plaintiff.

Mr. Samuels: All right, sir, I think it is a good idea.

Mr. Vergeers: We will call *Mr.* Raish.

#### ALMA RAISH,

the Plaintiff in the above-entitled cause, thereupon being produced as a witness in her own behalf, having been duly sworn, was examined and testified as follows:

#### Direct Examination

Q. (By Mr. Vergeers): Mrs. Raish, will you please state your full name to the Jury, please?

A. Alma Raish.

Q. And Mrs. Raish in the course of your testimony will you speak up so that you may be heard by the last Juror. Where do you live, Mrs. Raish?

A. I have lived in Eugene, but I live now at Akron, Ohio. [75]

Q. You have been a resident of Eugene, Oregon?

A. Yes, I have.

(Testimony of Alma Raish.)

Q. Have you lived in Oregon for the last seven or eight years?

A. Yes, I have lived in Eugene and Springfield.

Q. At what address was you last place of residence when you lived at Eugene?

A. My address was 3889 East 21st Street, Eugene, Oregon.

Q. With whom did you live? . . .

A. My husband and we were keeping Jimmy Calahan.

Q. He was your nephew?

A. He was my nephew's little boy.

Q. The three of you lived at that residence there? A. That is right.

Q. Prior to this accident, Mrs. Raish, what was your health like?

A. It was excellent, as perfect as it could be.

Q. Your health was excellent?

A. That is right.

Q. Were you employed at all? A. I was.

Q. What type of work were you doing?

A. I was an oiler for the Southern Pacific.

Q. You worked for Southern Pacific Railroad Company?

A. I worked five years, up until a year and a half ago and then we were laid off. We didn't work for about a month steadily after that and then we had been working for about a month. [76]

Q. What sort of pay did you receive?

A. I don't recall just at that time what it was. All I know is, it is \$1.69 per hour right now.



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(Testimony of Alma Raish.)

Q. Do you recall what your check would amount to at that time?

The Court: Is there any disagreement on that pay?

Mr. Gearin: I think it is \$257.32 a month.

Q. (By Mr. Vergeers): Does that seem right to you, Mrs. Raish?

A. I think we were on a five day week. I know it had been around that at that time. Maybe a little bit more.

Q. Now, Mrs. Raish, did the family maintain a car? A. Yes.

Q. What sort of a car was it?

A. It was a year old Fraser.

Q. Now on the day of this accident, Mrs. Raish, the 17th day of October 1950, did you go out in your automobile? A. We did.

Q. At what time of day did you leave home?

A. We were trying to make it to this appointment at 1:30, so it was probably 20 minutes after one, something like that.

Q. And you left Eugene, did you?

A. We left from home.

Q. From Springfield?

A. We lived about halfway between Springfield and Eugene. [77]

Q. Where were you going?

A. We were going to a chest clinic. They were holding that, and asked everybody to attend.

Q. Was that for a chest x-ray to be taken at that time? A. Yes.

(Testimony of Alma Raish.)

Q. Anybody in the neighborhood could go?

A. Yes, everybody was asked to cooperate in the affair for the neighborhood, especially if there were any children in the family, they wanted the parents to have them chest x-rayed, mostly for clinical purposes.

Q. What was that?

A. As I recall we had an appointment and we were a little bit early. We were trying to be there on time.

Q. When you left home, did you drive the car or somebody else?      A. I don't drive.

Q. Your husband drove the car then?

A. That is right.

Q. Do you recall when you reached the underpass and just passed it— do you recall it as it has been described here in this trial?      A. Yes.

Q. Do you recall going under it?      A. Yes.

Q. What was done right immediately after, as to driving the car after you went through it?

A. There was so much traffic coming and going on each side, my [78] husband pulled off to the side of the road. We sat in the car waiting for a break in the traffic.

Q. You went off to the left side of the road there or the right side?

A. To the right side there.

Q. You wanted to make a left turn?

A. Yes.

Q. Is there a road that leads to the left as you go south?

(Testimony of Alma Raish.)

A. There is a road that leads into the trailer court there.

Q. Is that where the chest x-ray set up was?

A. That is right.

Q. Now when your husband pulled off the road, he pulled off to wait for this traffic to subside?

A. That is right.

Q. He pulled clear off the road? A. Yes.

Q. You sat there and waited for the traffic to clear?

A. We were there a very short time: we had just stopped an instant.

Q. About how far off the pavement was the car?

A. I really don't know. I think it was well off the road into this parking place that is in front of this building.

Q. That is the auto wrecking place up beyond the underpass? A. That is right.

Q. What was the first thing you knew about this accident? [79]

A. Well, there was a bump on the back of the car.

Q. I beg your pardon.

A. There was a bump on the back of the car.

Q. Was it a light bump?

A. Not too heavy. I think Jimmy must have seen it because he was standing up in the middle, and he screamed.

Q. Then there was the bump?

A. The bump against the car started to move the car, and my husband and I glanced around to each

(Testimony of Alma Raish.)

other in surprise and put our hands up to protect little Jimmy. He used his left hand on the steering wheel and helped to hold Jimmy with his right hand. I automatically put out my left hand to hold up Jimmy. Then there was just a crunching, grinding and jamming all over.

Q. The grinding was of the glass and metal?

A. Yes, it easily could have been.

Q. Then you found yourself pinned inside of the automobile?

A. That is right. I was twisted around in the car, and when it finally came to rest, I was pinned down in the front someway, jammed up against the dashboard.

Q. Do you know what your position was at the time the car came to rest?

A. I seemed to be right along the edge—jammed and pinned under the front seat, crunched down in front with the seat up around me. The seat and all was crowded in and the windshield was right up against me, with all the other stuff pushed right together. [80]

Q. It was all piled toward you, sort of on top of you?      A. That is right.

Q. Were you aware of what happened to the other persons in the car?

A. No, I wasn't; I couldn't see them. I couldn't move at all. I was just pinned in there so tight that I couldn't move at all.

Q. Were your injuries at all painful at that time?

(Testimony of Alma Raish.)

A. Yes, I was in excruciating pain. My greatest sensation was my legs felt like they were burning up, and I could hardly breathe; something crushed down my chest. I told them unless they did something, I wasn't going to live very long. I think I told them I thought they could remove some of the vehicle.

Q. They raised some metal then and relieved the pressure on your chest?

A. They have me some injections in my right arm and they did that.

Q. That permitted you to feel a little relief?

A. A little bit; it made me feel a little bit better.

Q. What, if anything, hurt you worse at that time?

A. I wasn't too conscious of anything in particular. If anything, I just felt like I was going to die. I was wondering about the others; I tried to talk to them. Everything was so quiet and crunched down, it seemed like it was just the end. I didn't see how there could be anything alive; I just didn't see how they could be anything but dead. [81]

Q. Do you recall anyone administering any first aid to you while you were in there?

A. I asked them if they could get a doctor to put me out, and they said a doctor was on the way. I knew he was there when he finally came. He talked to me; I can't say I felt him give me anything.

Q. Did you remember his coming?

A. I knew he was there.



(Testimony of Alma Raish.)

Q. Do you recall his administering you anything?

A. I really can't say, I really can't say I felt it. I knew he did.

Q. Do you recall being removed from the automobile finally?

A. No. I could lift this arm some and swing it around and I knew when they lifted me out.

Q. You knew that when they lifted you out?

A. Yes.

Q. Did you know you were injured then?

A. Yes.

Q. Did that involve any pain?

A. Yes, it did.

Q. What kind of pain?

A. My shoulder were broken, collarbones were broken, and my ribs were hurt—they certainly hurt.

Q. These bones would grate together, would they? A. That is right. [82]

Q. Then where were you taken?

A. I was taken to the hospital.

Q. Now would you tell the Jury any particular injuries of your own knowledge that you received. You were bruised all over. Did you suffer from any particular bruises that you know of—any particularly severe bruises?

A. I was bruised all over—breast, arms, and shoulders, and legs.

Q. Did you suffer any cuts or abrasions?

A. Well, some on my arm, inside my nose, and I had a big tear on my right leg.

(Testimony of Alma Raish.)

Q. Quite a large place where the flesh was torn out?

A. Yes, the flesh was almost all taken out of there to the bone.

Q. About how much of it, how long was it?

A. I think it is about 7 inches long.

Q. Did they later apply a skin graft to that area?

A. Yes, they did. It seemed to have gotten some local infection in it, so they took the skin off of another place and applied a skin graft there.

Q. This wasn't infected at first?

A. Yes, it was—there was no flesh there left, so that they had to suture it up. They couldn't seem to get it to heal, and that was just the way they had to take care of it. They grafted skin on it. [83]

Q. Did that require an operation?

A. They took me to the operating room and took this skin off my thigh. It wasn't one of those painful operations. They just took skin off one place and put it on there and sewed it all in one piece.

Q. Was that taken off your left thigh?

A. That is right.

Q. And applied to what leg?

A. To the right leg.

Q. Did you have any other cuts, Mrs. Raish? You said your nose was bleeding and you had this severe abrasion on your leg?

A. Well, my eyes were swollen shut, and my face was all bruised. There seemed to be a very bad place on my lip. It seemed like my head hit the windshield and was very swollen there on my lip.

(Testimony of Alma Raish.)

Q. Did you have any particular trouble with your—let's go through with all of it at this particular time. How about your shoulders; what trouble did you have with them?

A. Well, the shoulders were swollen, and I really didn't have any use of my arms, because when I lifted them—

Q. Well, did you have any strength in your arms when you moved them? A. No.

Q. Were you able to move your legs?

A. Not for several days. I didn't have strength to move them. [84]

Q. Were you able to move your body at all?

A. Not myself, no.

Q. What was done in the way of treatment for you, that you were aware of?

A. I know they gave me injections and intravenous feedings, and after a few days, they came up to my bed and applied this cast to my left leg. I think it was about a week before they put the cast on the upper body, up over my arms.

Q. Where did this cast come?

A. One came all the way down by left leg—I had a fracture of my left ankle.

Q. You had a fracture of your left leg too?

A. Yes.

Q. How about your pelvis—was anything done about the bones of your pelvis?

A. They just kept me quiet. I couldn't move off my back.

Q. How long was it before you could move off your back?

(Testimony of Alma Raish.)

A. Before I could really turn over on my own to any great extent was 6 months.

Q. How long were you in the hospital?

A. I was in the hospital from the 17th of October to the first of the year.

Q. Now when you left the hospital, you were able to sit up, I assume?

A. Yes, but that is just about all. [85]

Q. How did you leave there?

A. My husband's brother came and got me and carried me to the car, and carried me into his home.

Q. To go back to the hospital experience, did you go back to the hospital shortly thereafter?

A. Well, I went home for Christmas— I went to their home for Christmas; then I went back again.

Q. But after you finally got out, were you back in there again?

A. I was back there in March of last year.

Q. In March?           A. Yes.

Q. About how long were you there that time?

A. I think it was 5 days.

Q. Let's start with the treatment at the hospital. You have told about your operation of the leg and transfer of skin from one thigh to the lower leg and the casts, and you told how your shoulders were immobilized and your leg immobilized. What else was done for you? You had blood transfusions, intravenous feedings; now what else was done for you?

A. They took a lot of x-rays and things like that. After this operation the anesthesia made me

(Testimony of Alma Raish.)

ill and got my stomach upset, and it went into stomach flu and I had to have more intravenous feedings.

Q. By this time you were able to eat by yourself, but you were unable to eat right after this operation? [86]

A. Oh, yes, by then I could, but at that time I wasn't able to eat. I just couldn't eat.

Q. Was any of this treatment painful at all?

A. Well, I wouldn't say all of it was; but the blood transfusions and the intravenous feedings are, especially the intravenous feedings are if the veins are as large as mine and you have to go in about seven times to get to the arteries for the intravenous feedings.

Q. You were kept in one position?

A. Yes, that is right.

Q. Where were these feedings made?

A. They were in the thigh and they were swollen all of the time.

Q. Did you have to lie flat on your back and did that cause you any pain at all?

A. It certainly did after you took the cast off, my back just about killed me.

Q. How about the skin graft operation on the lower leg—was that at all painful?

A. Well, the donor spot was very painful, especially when they used alcohol on it. It was very painful.

Q. Did that pain continue for some time?

A. Yes, it did.



(Testimony of Alma Raish.)

Q. Did you suffer from any headaches?

A. No, I don't think so. [87]

Q. You were actually not unconscious during that period of time until they got you to the hospital?

A. I don't think so. I think after they got me to the hospital they must have given me something and I went to sleep. I don't think I was unconscious for long periods of time, however.

Q. Except for brief periods, when you had anesthesia and things like that?

A. That is right.

Q. What was the occasion for your going back to the hospital in March?

A. I think it was in March some time, the Sunday before Easter, right before Easter.

Q. What was the occasion for that?

A. I had developed a condition in the deep veins.

Q. How did you know about that?

A. Well, from the time I was in the hospital my legs swelled more or less just as I lay there and wasn't on them that length of time. Then I was up and on my legs and then they swelled more and edema set in. They were very badly swollen after I got out of the hospital and I kept going back to the doctor and it was on one of these trips that I went to the doctor that he put me in the hospital.

Q. Then after this condition developed, there was a lot of swelling, followed by a whole lot more swelling in your legs. Then you went back to the hospital for observation? [88]

## (Testimony of Alma Raish.)

A. I went back to the hospital, the doctor sent me to the hospital.

Q. What was done?

A. There were some more painful shots—some stuff put into the blood to thin the blood to try to dissolve the clots.

Q. Did that treatment improve your condition at all?

A. While I was in the hospital, I kept off my legs and the swelling went down some; after that when I got out, it went back up again. I have been wearing elastic stockings ever since to relieve the swelling a little bit.

Q. You wear them all the time?           A. Yes.

Q. Can you remain on your feet for any length of time?

A. Not without my legs swelling.

Q. When they swell, is it very painful?

A. Yes, it is; it is very uncomfortable.

Q. Have you been doing any work at all since the accident?           A. No, I haven't.

Q. Are you able to do any work?

A. No, not any hard work.

Q. Has your condition noticeably improved in the last couple of months at all?

A. No, I don't think so.

Q. Is your condition as far as you are able to tell now—is it static; that is, it doesn't change at all? [89]           A. It seems to be.

Q. It is getting no worse that you are aware of?

A. No.

(Testimony of Alma Raish.)

Q. How about your face? You said in your testimony, I believe, that your face was all bruised, your eyes were shut. Were the injuries that you had to your face healed properly?

A. Well, my upper lip—there was a place on my upper lip that was bruised and a lump there. Now this lump is numb. I can't feel anything.

Q. How about the upper area?

A. I think there was a broken cartilage in my nose.

Q. Do you have any idea of what might have cut the tissues?

A. It was just bruised, hit anyhow. There was a mark across the lip; it wasn't cut openly, but there was a mark across there.

Q. Mrs. Raish, did—has there been any change in your mental condition, which causes you concern?

A. Well, my mental condition doesn't seem to improve any.

Mr. Gearin: We object to that about any attitude of hers. That is not covered in the Pre-trial Order as to any change or whether or not she suffered any mental condition as a result of this accident.

Mr. Vergeers: The application is only to show that she suffered shock and damage to her [90] nervous condition as a result of this accident, Your Honor.

Mr. Gearin: If it just goes on for that, I will have no objection.

The Court: All right, go ahead.

(Testimony of Alma Raish.)

Q. (By Mr. Vergeers): What is your age?

A. I am 56.

Mr. Vergeers: That is all.

### Cross Examination

Q. (By Mrs. Gearin): Mrs. Raish, up until about now, you have been feeling better as time goes on, haven't you?

A. Well, I can't see any particular improvement in the last six months.

Q. Do you remember when we took your deposition and do you remember telling me then that you thought you had improved?

A. Certainly, I have improved.

Q. And you can do some housework now?

A. I do a little bit of housework; that is about all.

Q. You live with someone back there?

A. With my sister.

Q. You do what you can do around the house, don't you?

A. I do very little. [91]

Mr. Gearin: We will have some trouble with this Pre-trial Exhibit No. 38, which is the Covenant, Your Honor.

The Court: Ask her what you want on it.

Mr. Vergeers: She admits that she signed it; there is no question about that.

The Court: There is no question with counsel is there that her testimony will be the same as before in that respect.

Mr. Vergeers: Her testimony will be the same as before on that point, yes.

(Testimony of Alma Raish.)

The Court: I think this is something that Mr. Gearin wants to proceed with.

Mr. Gearin: That is right.

The Court: Have you got a copy?

Mr. Gearin: Yes, there is one here in the deposition. I will take it from the deposition.

Mr. Vergeers: We will agree that we think that is the same as the original, Mrs. Raish.

Q. (By Mr. Gearin): Mrs. Raish, we have agreed this is a copy of the original covenant. You recall that you signed the original of that? A. Yes.

Q. That is the only agreement that you have ever had with the Los Angeles-Seattle Motor Express and the Transport Indemnity [92] Company in connection with your injuries, is that right?

A. That is right.

Q. And you did receive some \$27,000 from the Transport Indemnity Company, is that right?

A. Yes, I did.

Mr. Gearin: That is all.

#### Redirect Examination

Q. (By Mr. Vergeers): Mrs. Raish, in signing that agreement, did you intend at any time, did you ever intend in any way to waive claim as against the Southern Pacific Company?

A. No, I didn't.

Mr. Gearin: We object to this question and answer on the ground and for the reason that this is a written document and speaks for itself. The witness has testified that this is the only agreement she has.



(Testimony of Alma Raish.)

The Court: Objection sustained. The Jury is instructed to disregard the answer of Mrs. Raish.

Mr. Vergeers: That is all.

Mr. Gearin: That is all.

The Court: I think this is a good time to take our afternoon recess. We will take a recess for about 10 minutes. The Jury is admonished as to making up their minds about this case and talking about it [93] before it is submitted to them.

(The Jury leaves the Jury Box.)

Out of the presence of the Jury.

The Court: I am going to call this document, Covenant not to Execute, as it does in the Pre-trial Order, a Covenant Not to Sue, but if you think you want further testimony from Mrs. Raish on this point, you may wish to make an offer of proof.

Mr. Vergeers: I think we will stand on the document, itself.

Mr. Gearin: We will object since the Court has construed this document as a Covenant not to sue, and since we have by Pre-trial Order made it one of our positions that it must be construed as a release, and we would object to the Court construing it in any other way, other than instructing the Jury that it was not a Covenant not to sue, but it should be instructed that it is a release.

The Court: Do you want to state to the Jury the agreement that was made between you and Mr. Samuels, or are you going to do it in your case in chief.

Mr. Gearin: We are going to do something to that effect some time.

(Testimony of Alma Raish.)

The Court: That is all right. The Plaintiff [94] will wind up its case in chief today. Do you want to make your offer of proof at this time.

Mr. Vergeers: Yes.

Mrs. Raish was then interrogated in the Judge's Chambers as follows:

Q. (By Mr. Vergeers): Mrs. Raish, I will ask you to examine this document, Covenant Not to Execute, which you signed agreeing not to sue the Los Angeles-Seattle Motor Express Company. Did you intend by the signing of this agreement to release the Southern Pacific Company? A. No.

Q. Have you ever waived any claims as against them as a result of this accident?

A. I did not.

Q. Did you specifically state at the time you signed this agreement that you reserved your right to sue the Southern Pacific Company?

A. That is right.

Q. Was that mentioned at that time?

A. I don't recall whether it was or not.

Q. Is that what you intended doing, however, to go ahead and sue them? A. Yes.

Q. Is that your testimony? [95] A. Yes.

Q. At the time this money was paid to you, this \$27,000 was that considered as full compensation for your injuries?

A. I certainly didn't understand that.

Mr. Gearin: My objection goes to all of this, Your Honor. May that be understood?

The Court: Yes.

(Testimony of Alma Raish.)

Q. Were you told at that time that that document which you were to sign released only the trucking company or was it an agreement for you not to sue the Southern Pacific Company?

A. I understood—I really only released only the trucking company.

Q. You understood that you really did not release them, but you agreed not to sue them or execute any judgment against them, is that what you mean? A. Yes.

Q. (By Mr. Gearin): Mrs. Raish, you understood that by executing that agreement you could not have collected any judgment, any money, any further money from the Los Angeles-Seattle Motor Express Company? A. Yes.

Q. At the time that agreement was entered into with the representative of the Transport Indemnity Company, the truth of the matter is that they told you at that time, they told you or suggested to you at that time that you had a perfect claim against the Southern Pacific Company, didn't they? [96]

A. No, I don't think they did at that time.

Q. You have never discussed the liability of the Southern Pacific Company with any representative of the Transport Indemnity Company?

A. No, I don't think that I did.

Q. Is it not a fact that you made no claim against the Southern Pacific Company by written or oral demand or any commencement of any suit at any time whatever, until after you had made this agreement with the Los Angeles-Seattle Motor Express Company?

(Testimony of Alma Raish.)

A. I understood my brother-in-law was talking about all of that. He told me about that.

Q. Why did you not sue the Los Angeles-Seattle Motor Express Company?

A. Why didn't I sue them?

Q. Yes.

A. I came to this agreement. I needed some money and I had thousands of dollars of expenses.

Q. Did you understand that you were or you were not releasing them from liability—I mean the Los Angeles-Seattle Motor Express Company?

A. I didn't realize that I was releasing them—I released them so that I couldn't get any further money from them. That is what the release says.

Q. Did they explain to you the difference between release and covenant not to execute? [97]

A. Somebody did.

Mr. Gearin: That is all.

Mr. Vergeers: No further questions.

The Court: The offer of proof is rejected for the reason that I have construed the document as a covenant not to sue.

Mr. Vergeers: We understand the Court has construed the document as being a covenant in the nature of not to sue, is that right?

The Court: Yes.

In the presence of the Jury.

Mr. Samuels: The Plaintiff at this time will withdraw from the case our allegations of specification of negligence relative to improper marking of the clearance of the overhead pass inasmuch as there has been no proof in anyway as to that.

The Court: That is all right. Have you any medical expenses other than those set forth in Paragraph IV on page 4 of the Pre-trial Order?

Mr. Samuels: I believe that covers it, Your Honor.

The Court: That is a stipulation then?

Mr. Samuels: Yes.

The Court: What do they total?

Mr. Samuels: \$2,285.80.

The Court: Ladies and Gentlemen of the Jury, [98] it is agreed that Mrs. Raish expended the sum of \$2,285.80 for medical expenses in connection with the injuries which she sustained. Included in this figure of \$2,285.80 are the following expenses:

Rental for crutches from the Eugene Brace and Limb Shop .....	\$ 4.00
Medical expense from Dr. Tom Mulholland .....	53.00
Ambulance service from the Valley Ambulance Service .....	30.00
Medical bill from Dr. E. D. Furrer.....	10.00
Medical bill from Dr. Howard A. Molter..	389.50
Medical bill from Dr. Leonard D. Jacobson .....	51.50
Surgical Hose .....	20.50
Hospital bill at Sacred Heart General Hosp.	1,396.80
Dr. Wallace Baldwin .....	330.50

The defendant is not requiring the Plaintiff to prove the reasonableness of those bills by any testimony. He admits that those expenses were rendered and that the charges were reasonable. Of course, he is not admitting that the Southern Pacific Company should pay them, and he does not admit that it is liable for any part of that amount.



It is also admitted that the Plaintiff was employed as a carmen's helper, earning an average salary of \$257.32, at the time of this collision and [99] that she has lost income totaling \$4,503.10. The Defendant admits the amount of her wage rate and admits if she had been working all this time, she would have earned approximately that much, but it doesn't admit that it is liable for any portion thereof. Is that a correct statement, gentlemen?

Mr. Samuels: Yes.

Mr. Gearin: It is satisfactory, Your Honor. [100]

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The Court: Mr. Vergeers, I have been considering the offer of proof that you made, and in view of the fact that I am going to rule the way I am, I see no reason why the offer of proof should not be accepted. I will permit you to call Mrs. Raish to the stand again and make the offer by the questions you have asked her before. Mr. Gearin, you may have an exception.

Mr. Vergeers: I will call Mrs. Raish to the stand, again.

#### ALMA RAISH

the Plaintiff, thereupon being recalled as a witness in her own behalf, and having already been duly sworn, was examined and testified further as follows:

Direct Examination [135]

Q. (By Mr. Vergeers): Mrs. Raish, you will recall the document which was referred to heretofore during the trial. I think we referred to it as a "Covenant not to Execute" which you entered into with the Los Angeles-Seattle Motor Express Com-

(Testimony of Alma Raish.)

pany. Is that a copy of it which you are being handed now?

A. Yes, I understand it is a copy of it.

Q. I am just having it handed to you now and you keep it for the purpose of the questions I am going to ask you. When did you enter into that agreement with this company?

A. The 26th day of July.

Q. When? A. The 26th day of July.

The Court: What year?

The Witness: 1951.

Mr. Gearin: I assume that my objection goes to all of this questioning, Your Honor.

The Court: That is right.

Q. (By Mr. Vergeer): At that time you entered into that agreement, Mrs. Raish, what was your understanding about that agreement with reference to any claim you might have against the Southern Pacific Company?

A. Well, I didn't understand that this had anything to do with any claim I had against the Southern Pacific Company.

Q. Was it your intention to reserve your claims against the [136] Southern Pacific Company?

A. Yes.

Mr. Gearin: Your Honor, I object to that question; it is highly leading and it is putting words in her mouth.

The Court: Yes, I think it was a leading question, and I think it was improper.

Mr. Gearin: I move that the answer be stricken and the Jury be instructed to disregard it.

(Testimony of Alma Raish.)

The Court: Yes, I am going to strike that. The answer will be stricken and the Jury is instructed to disregard the answer.

Q. (By Mr. Vergeers): Were you conscious of any claim against that company, against the Southern Pacific Company? A. Yes.

Q. Did this document purport to have anything to do with that claim at all? A. No.

Q. What was your intention with reference to the claim against the Southern Pacific Company?

A. Well, I intended to go ahead and try to do something about it.

Q. Press your claim against them, is that what you mean? A. Yes, that is right.

Q. Did you, at that time, understand that this document in any [137] way would prohibit you from doing that?

Mr. Gearin: I don't like to have her understanding; I want to know if anybody told her anything about it.

Mr. Vergeers: I think that is all.

#### Cross Examination

Q. (By Mrs. Gearin): Mrs. Raish, as a matter of fact, it wasn't until after you made this agreement with the Transport Indemnity Company that you ever thought about a claim against the Southern Pacific Company, and then for the first time you made the claim against the Southern Pacific Company by the filing of this lawsuit?

A. I don't believe I quite understand the question.

(Testimony of Alma Raish.)

Q. As a matter of fact, no time prior to the time you filed this suit, did you ever make any claim against the Southern Pacific Company?

A. My brother-in-law was taking care of it for me.

Q. Do you know whether or not he did make any claim?

A. I am of the opinion that he did. I couldn't say for sure, however.

Q. You don't know whether or not he did, do you?      A. No, I really don't know.

Q. Mrs. Raish, you filed this action against the Southern Pacific Company, after you had made this settlement with the [138] Transport Indemnity Company, did you not?

A. Yes, I did, but I knew all the time that I was going to do something about it.

Mr. Gearin: I think that is all.

The Court: Any further questions.

Mr. Vergeers: No, Your Honor.

Mr. Gearin: No, Your Honor.

The Court: That is all, Mrs. Raish. You may have your exception to this whole line of questioning, Mr. Gearin. [139]

\* \* \* \* \*

Go ahead, Mr. Gearin.

Mr. Gearin: At this time, the defendant would like to introduce into evidence the following: maps which have been identified in the Pre-trial Order, Exhibits No. 57 and 58, the Pre-Trial Exhibit No. 38, being the original Covenant not to Execute and the photographs marked in the deposition of Mr. Embleton, which are numbers 45 to 55 inclusive.

Mr. Samuels: No objections.

Mr. Gearin: —and the x-rays of Dr. Marxer which were identified in his deposition.

Mr. Samuels: No objections.

The Court: They all may be admitted.

(Two maps were then marked offered and received in evidence as Exhibits No. 57 and 58. The Original Covenant not to Execute was then marked offered and received in evidence as Exhibit No. 38, and photographs marked in the deposition of Mr. Embleton as Exhibits 45 to 55 inclusive were then offered and received in evidence, and x-rays of Dr. Marxer which were identified in his deposition, were then received in evidence.)

Mr. Gearin: The defendant rests.

The Court: Do you have a motion at this time, Mr. Gearin?

Mr. Gearin: Yes, Your Honor. At this time, [188] if the Court please, the defendant moves the Court for an order directing the Jury to return its verdict against the Plaintiff in favor of the Defendant on the ground and for the reasons that:

(1) There is no evidence that the Defendant was guilty of negligence in any one or more of the particulars charged by the Plaintiff;

(2) that any act or any omission on the part of the Defendant constituted proximate cause of the accident and of the Plaintiff's injury and damage and as a corollary to part 2 of our motion we submit that the evidence is uncontradicted and affirmatively establishes that the sole proximate cause of



the accident was the negligence of Mr. Embleton or his conduct, whether negligent or not or as a part B of motion No. 2, the cause of the accident was the conduct of the driver of the unidentified red truck;

(3) the third basis of our motion for directed verdict is this: I appears from satisfactory evidence that the amounts which the Plaintiff received from the Transport Indemnity Company or the Los Angeles-Seattle Motor Express Company, namely, \$27,000, is a matter of law just and adequate compensation for her injuries and damages;

(4) the fourth basis of our motion for a directed verdict [189] is based on the legal basis and that is, it affirmatively appears that the document which the Plaintiff has executed, entitled, Covenant not to Execute, has been construed by the Court to be a Covenant not to Sue; it is our position that one of the essential elements of the Covenant not to Sue is a reservation contained in said document to permit one to sue later against a third party. Since this document has not such reservation, the Court, therefore, has to construe the document as a release and considering it as a release, it would inhere to the benefit of the Southern Pacific Company.

For all of the above reasons and therefore as a matter of law, we are entitled to a directed verdict or judgment.

The Court: I am taking your motion under advisement, and will submit the case to the Jury.

(The cause was argued to the Jury by counsel for the respective parties and thereafter the Court instructed the Jury as follows:)

## INSTRUCTIONS TO THE JURY

Plaintiff, Alma Raish, seeks to recover for personal injuries which she sustained and which she claims resulted from the negligence of the defendant, Southern Pacific Company. Before taking up the specific charges of negligence made by the plaintiff against the defendant, Southern Pacific Company, I instruct you that the mere fact that an accident occurred is [190] no evidence of negligence and you may not find that either the defendant or anyone else was negligent solely by reason of the fact that an accident occurred. The law does not impose liability upon any person in the absence of fault nor does the law presume that any person is at fault in the absence of proof of such fault. On the contrary, the law presumes that each party involved in this accident exercised the care which an ordinary prudent person would have exercised under all of the circumstances. If the accident happened when all parties were in the exercise of due care, then the law would not impose liability upon anyone. That is, if the accident were an unavoidable one, without fault on the part of any party involved in this case, plaintiff could not recover in this action.

The law imposes upon the party who claims that another is at fault the necessity of proving that claim by evidence. The claim must be proved not only by evidence but also by the greater weight of the evidence. This is known as the preponderance of the evidence. Preponderance of the evidence does not mean the greater number of witnesses but the

greater weight and the convincing character of the evidence that is introduced.

Plaintiff was required to specify the manner in which she claims that the defendant was at fault. I instruct you that the plaintiff is bound by the allegations of negligence charged against the defendant, which I will outline for you, and must recover, if at all, upon those allegations and no [191] others. Therefore, if you believe that the defendant was guilty of negligence in some particular not mentioned in my instructions, you cannot consider such other negligence, even if you find such other negligence existed.

Now the claims of negligence upon which plaintiff must recover, if at all, are the following:

First, that the defendant constructed and maintained its overhead crossing at a height insufficient for the safe passage of persons making ordinary use of the public highway; and second, that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of the highway.

In order to recover, plaintiff is required to prove at least one of these specifications of negligence by a preponderance of the evidence. Negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. In determining whether the defendant exercised reasonable care in the construction and maintenance of the overhead crossing in question, its conduct is

to be measured against the standard of what a reasonably prudent person would have done, or would not have done, under the same similar circumstances.

It was the duty of the railroad company to so construct [192] and maintain its overhead crossing as to afford clearance for ordinary vehicular traffic and in this respect it was charged with anticipating the normal manner in which the highway would be used, including the use of such highway not only by passenger cars and busses but also by trucks and trailers of all kinds and sizes permitted under the Oregon law to use the highway. Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders.

I have stated that the defendant was bound to anticipate the ordinary use of the entire roadway and, in absence of notice to the contrary, the drivers of vehicles had a right to assume that the defendant would not maintain an obstruction to the highway which would be dangerous to those using it by ordinary means. Of course, if the danger was so obvious and apparent that persons, in the exercise of ordinary care, would have seen it, particularly drivers who had passed under it on numerous occasions would be charged with notice of it.

In connection with plaintiff's charges of negligence against the defendant, I instruct you that the defendant, that is, the Southern Pacific Company,



had a right to assume that all persons driving vehicles upon the highway would obey the law and would not drive in a careless and negligent manner. [193] Defendant, the railway company, had a right to rely upon such assumption until such time as it knew, or in the exercise of reasonable care should have known, that the law would not be obeyed.

As I have previously instructed you, the plaintiff must prove the specifications of negligence against the defendant by a preponderance of the evidence. This means that, unless the evidence that the defendant is at fault, in one or both of the specifications that I have read to you is clearer and more convincing than the evidence that it was not at fault, you may not find in favor of the plaintiff. In other words, if the evidence that the defendant constructed and maintained its overhead railroad structure at a height and width which would have afforded clearance for cars, busses and trucks making ordinary use of the highway is just as clear and just as convincing as the evidence that such structure was not so constructed, then you may not impute fault to the defendant on such specifications.

The plaintiff need not prove that the defendant was guilty of negligence in both of the specifications. It is sufficient if she proves that the defendant was guilty of only one of them—that is, either that the structure was of insufficient height or that it was of insufficient width so as to permit persons making ordinary use of the highway to operate their vehicles in safety under it. If you find that plaintiff has [194] failed to prove one of such specifications by a preponderance of the evidence, then



your deliberations will be at an end and you will bring in a verdict in favor of the defendant. If, however, you find by a preponderance of the evidence that the defendant was guilty of negligence in one or both of the specifications which I have read, you will consider the question of proximate cause.

Proximate cause is probable cause. It is that cause which alone, or in conjunction with other causes, produced the accident and injury. Thus an act or omission of a person, which sets in operation some factor or other thing that brings about an injury, is held to be the proximate cause of the injury unless the causal force or operation of the act or omission has been broken by some new or intervening cause prior to the injury. A cause without which a result would not have occurred is a proximate cause. This does not mean that the law recognizes only one proximate cause of an injury, consisting of one act or omission by one person. On the contrary, acts or omissions by two or more persons may operate or work concurrently either individually or together to cause an injury and in such a case each is regarded in law as a proximate cause.

Now the defendant has denied that it was guilty of negligence in either of the respects alleged by the plaintiff and it claims that the injuries which plaintiff suffered were due solely to the negligence of Mr. Embleton, the driver of the [195] truck and trailer or due solely to the negligence of the driver of the unidentified red truck which passed Mr. Embleton's truck and trailer in the opposite direction or was due solely to the combined negligence

of Mr. Embleton and the driver of the unidentified red truck.

If you find that Mr. Embleton's conduct constituted the sole cause of the accident and the resulting injuries to the plaintiff, your verdict should be for the defendant, the Southern Pacific Company. Likewise if you find that the sole and proximate cause of the accident and plaintiff's injuries was the conduct of the driver of the unidentified red truck, your verdict must be in favor of the defendant, the Southern Pacific Company, and the same is true if you find that her accident and injuries were caused by the combination of the conduct of Mr. Embleton and the driver of the unidentified red truck.

I so instruct you because, if the conduct of Mr. Embleton or the conduct of the driver of the unidentified red truck alone or the combination of their conduct was the sole cause of the accident and the resulting injuries to Mrs. Raish, the Southern Pacific Company would not be chargeable with any negligence even if it existed because such negligence would not be the proximate cause of the accident.

However, the fact that Mr. Embleton may have been negligent or the fact that the driver of the unidentified red truck [196] may have been negligent does not exonerate the defendant, the Southern Pacific Company, if you find, by a preponderance of the evidence, that the defendant, Southern Pacific Company, was guilty of negligence in either of the two respects that I have read to you and if you find, by a preponderance of the evidence, that such negligence on the part of the Southern Pacific

Company proximately caused or contributed to the accident and the resultant injuries to Mrs. Raish.

I want to make this perfectly clear to you, if Mr. Embleton's conduct, whether negligent or not, solely caused the accident, there can be no recovery. If the conduct of the driver of the unidentified red truck solely caused the accident and the resultant injuries to Mrs. Raish, there can be no recovery against the Southern Pacific Company. If the negligence of Mr. Embleton and the negligence of the driver of the red truck combined and was the sole cause of the accident and the injuries to Mrs. Raish, there can be no recovery against Southern Pacific. That is true even though you find that the Southern Pacific Company was guilty of some negligence in the manner in which it constructed and maintained the overhead structure. However, if you find that the Southern Pacific's structure was improperly constructed or improperly maintained because it was of insufficient width or insufficient height to permit persons making ordinary use of the highway to operate their vehicles in safety under it and if you further find that [197] such negligence was the sole cause or a contributing cause to the accident, your verdict should be in favor of the plaintiff even though you find the conduct of Mr. Embleton, or the conduct of the driver of the unidentified red truck, or a combination of their conduct likewise contributed to the accident.

That may not be entirely clear to you so I want to repeat this: If you find that this accident was solely caused by the negligence of the Southern Pacific Company then Mrs. Raish is entitled to re-

cover. Mrs. Raish is also entitled to recover if you find the company was negligent and its negligence combined with the negligence of Mr. Embleton alone or Mr. Embleton and the driver of the unidentified red truck to contribute to this accident.

You will recall that the defendant contends that Mr. Embleton was guilty of negligence in a number of respects. First, that he operated his truck at a speed that was greater than was reasonable and prudent under the circumstances. Second, that he failed to have his truck under proper or any control. Third, that he operated the truck without adequate or efficient brakes. Fourth, that he failed to maintain a proper lookout.

I have already read to you the requirement that you may consider these specifications in the light of the definition of negligence which I have already laid down for you. As you will recall, negligence is the doing of an act which a person of [198] ordinary prudence would not have done under the same or similar circumstances or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances.

I merely want to repeat to you that whether or not that conduct of Mr. Embleton was negligent is not material if you find that such conduct on his part, or the conduct of the unidentified driver of the red truck, or the combination of their joint conduct, was the sole and proximate cause of the accident and resulting injuries to Mrs. Raish. I further want to repeat that, even though one or both of such drivers were negligent, that will not relieve the Southern Pacific Company from its liability if,



in fact, it did have an improper structure and the structure caused or contributed to the accident and resulting injuries to Mrs. Raish.

If you find in favor of the plaintiff on the basis of the instructions heretofore given you, then you should determine the amount of damages that the plaintiff should be awarded. Damages, like any other proposition, must be proved by a preponderance of the evidence and the plaintiff on that issue had the burden of proof. Now the mere fact that I am instructing you on the subject of damages does not mean that I think the plaintiff is, or is not, entitled to recover in this case. I am expressing no opinion on that subject one way or the other. In assessing damages you should take into consideration the [199] injuries the plaintiff has sustained, the pain and suffering which she has endured, and the pain and suffering which she will endure in the future if you find that she has and will in the future endure pain and suffering.

You should take into account any permanent disability plaintiff has sustained as shown by the evidence in this case, any loss of power in performing labor, any impairment of the ability to earn money considering her position and station in life, and generally, ladies and gentlemen, you should give her such amount as, under the evidence in this case will reasonably compensate her for pain and suffering and injuries past, present, and future.

You may also consider the amount expended by her for medical and hospital attention. In this case evidence was introduced that the plaintiff expended \$2,285.00 for medical and hospital services and it



is admitted by the defendant that said bills and expenses so incurred are reasonable. Therefore, if you find in favor of the plaintiff, you may allow her not to exceed the sum of \$2,285.00 for such medical expenses.

Plaintiff also alleges that by reason of the injuries she has been specially damaged in the sum of \$4,503, which represents the amount of wages she contends she lost to date as a result of the accident. It is admitted that, at the time of the accident, she was employed as a carman's helper at an average of \$257.32 a month. In the event that you find for the [200] plaintiff, you may allow her said loss of income to date not exceeding the sum of \$4,503.

In addition to these two items of special damages, you should award her such sum as general damages which you think is proper for the injuries she has sustained. Your decision with reference to the amount of damages is that which will compensate her for the injuries which she has received in this accident and must be reached and founded upon an unprejudiced consideration of all the facts of the case and without sympathy, prejudice, or a desire to punish anyone and without any thought of the plaintiff's financial condition or the defendant's ability to pay.

You should also consider what her future course will be and whether there is going to be improvement. Plaintiff contends that she has been permanently injured, and I instruct you that, before you are warranted in allowing plaintiff any sum by way of compensation for any alleged permanent

injury, you must be reasonably certain from the preponderance of the evidence that plaintiff has sustained permanent injury and disability. The evidence showed that Mrs. Raish is 56 years of age and, according to the mortality tables presently in use plaintiff's life expectancy is 19.96 years or practically 20 years. The fact that she has this life expectancy does not mean that she will live that long or that she will not live longer. Neither does it mean that she would be employed and [201] earning money during that period of time, but it is one element which you may take into consideration in determining the amount of damages to which she is entitled.

In this case the evidence showed that the plaintiff received \$27,000 on account of the injuries which she sustained in this accident from the Los Angeles-Seattle Motor Express. If you find that the sum of \$27,000 heretofore received by plaintiff fully compensates her for the injuries which she has sustained, then your verdict must be for the defendant, Southern Pacific Company, even though you have found that the Southern Pacific Company was negligent and that such negligence was the proximate cause or a contributing cause of the accident and of her injuries. This is so because one may not have more than one full recovery for the damages one sustains in one accident. However, if you find that the sum of \$27,000 which she received was not sufficient to fully and fairly compensate her for the injuries which she sustained in this accident, then you are to allow her such sum as you believe under the instructions that I have heretofore given you

will fully compensate her for all of her damages without any deductions, because from any verdict in excess of \$27,000 which you may bring in the Court will deduct the sum of \$27,000, and plaintiff will only receive the difference. I want to make this perfectly clear to you. If you find that the sum of \$27,000 fully compensates plaintiff for the injuries which she [202] has sustained, bring in a verdict for the defendant, even though you think that the Southern Pacific Company was solely responsible for this condition, but if you find that the Plaintiff is entitled to recover against the defendant because the defendant was negligent and its negligence caused or contributed to the accident, and if you find that \$27,000 does not fully and adequately compensate her for such injuries, bring in a verdict for the amount that will fully compensate her without any deduction of the \$27,000 and after the verdict is brought in, I will deduct from that amount the sum of \$27,000. The judgment which Mrs. Raish will obtain is the difference.

A word about quotient verdicts. The jury is not permitted to strike an average from the amounts which the individual jurors think that plaintiff is entitled. In other words, you may not agree in advance that the total of the amounts, which each juror feels the plaintiff is entitled to, divided by 12, shall be the verdict of the jury. Of course, if you get to the point of damages, you should discuss it fully just as you do every other phase of the case and on the basis of your discussions arrive at a figure which is satisfactory to each juror—but don't do it by agreeing in advance to add up the

amounts each juror feels plaintiff is entitled to and then divide that total by 12.

I want to remind you that what an attorney says during [203] the course of the trial or in his argument to you or to the Court is not evidence. You may follow the inferences and deductions that are made to you by a particular attorney if they seem reasonable and logical to you but you are not bound to do so. I have not commented upon the evidence in this case more on the credibility of any witness and, if any of you think that you know what I think about this case and how it should be decided, you are not bound by my opinion. Of course, none of you know that.

During the course of the trial, I made a number of rulings on questions of law, particularly on the admissibility of evidence. These rulings have no relation, so far as you are concerned, to the questions of fact. It is your duty to ignore evidence which was ruled out and you are not to speculate on what might have been proved by evidence that was not admitted.

You are the sole and exclusive judges of the facts in the case and of the credibility of all the witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence.

The direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in the case. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in [204] which he testifies,



the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence. If you find that a witness has testified falsely in any one material part of his testimony, you should look with distrust upon the other evidence given by such witness; and, if you find that any witness has testified willfully false, it will be your duty to disregard entirely all the evidence given you by such witness unless corroborated by other evidence which you do believe.

Any fact in the case may be proven by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which in itself, if true, conclusively establishes the fact. If a witness testifies to a transaction to which he has been an eye witness, that is direct evidence, and you have that kind of evidence in this case. Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another and which, though true, does not in itself conclusively establish the fact, but affords an inference or presumption of its existence. That evidence is also before you, ladies and gentlemen, in the form of photographs, maps, and x-rays. It is, however, indirect evidence. Indirect evidence sometimes may be stronger on account of the inferences that may be drawn from it than the testimony of the eye witnesses. [205]

You should look with caution upon the oral admissions of any witness, as that kind of evidence is subject to mistake. The party himself may have been misinformed, or may not have clearly ex-



pressed his meaning, or the witness may have misunderstood him.

You will have with you in the jury room the exhibits that have been introduced in this case. You will also have with you the following two verdicts, but before I describe the verdicts, there is a matter that I must take up with counsel.

Out of the presence of the jury.

Mr. Samuels: We have just one exception, Your Honor. We except to the instruction to the Jury that all persons using the highway by the underpass had the right to assume that the defendant would not maintain an obstruction to the highway that would be dangerous to those using it by ordinary means because there was negligence in the use of the underpass here.

Mr. Gearin: We object to the Court instructing the Jury that vehicular traffic is entitled to use the entire roadway including the shoulder thereof in determining whether or not there was sufficient clearance under the overpass, on the ground and for the reason that that statement is an incorrect statement of the law and has no applicability to the instant case. The Jury is to consider only whether an obstruction is [206] being maintained over any part of the highway surface.

We object to the failure of the Court to give Defendant's Requested Instruction Nos. Ia, Ib, and Ic, on the ground and for the reason that there is no evidence of negligence in the record on the part of defendant.

We object to the failure of the Court to give our Requested Instruction Nos. IIa and IIb, on the ground and for the reason that the evidence clearly establishes without contradiction that the negligence of the driver of the truck constituted the sole proximate cause of the accident.

We object to the failure of the Court to give our Requested Instruction Nos. IVa and IVb, on the ground and for the reason that the document which the plaintiff signed was, as a matter of law, a release, and for that reason the Court should have directed the Jury to return a verdict against plaintiff and in favor of defendant.

We object to the failure of the Court to give our Requested Instructions Nos. VIa, VIb and VIc, on the ground and for the reason that it is our understanding that the Oregon statute provides and the Oregon cases hold that the burden of proof must be based upon satisfactory evidence, which the statute defines as the quantum of proof, and not merely the preponderance of the evidence, upon which Your Honor instructed the Jury.

We object to the failure of the Court to give our Requested Instructions Nos. VIIa, VIIb, VIIc and Nos. VIIIa, VIIIb and VIIIc, which requested instructions withdrew the charges of negligence in the two specifications which were submitted to the Jury, on the ground and for the reason that there was no evidence of negligence in either of the two specifications.

We object to the Court withdrawing from the consideration of the Jury the charges made by de-

fendant that Thomas Ivisin Embleton was guilty of negligence in operating the truck without proper brakes and without proper steering mechanism. Our objection is based upon the record, which indicates that there was satisfactory evidence in these two particulars.

We object to the failure of the Court to give our Requested Instructions Nos. XIVd and XIVE, which contained the breaking statute of the Oregon motor code with regard to the negligence of Embleton, it being our contention that under the evidence it was proper for the Court to give the statute as part of its instructions.

We object to the failure of the Court to give our Requested Instruction No. XVII regarding the "covenant not to Execute," in submitting that question to the Jury the Court then permitted the plaintiff to testify concerning her intent to execute that agreement. The Court failed to give an instruction to the Jury to the effect that in the event she did not reserve the right to proceed against Southern Pacific Company, then that document would be a release rather than a [208] covenant not to execute or sue.

We object to the failure of the Court to give our Requested Instruction No. XXI, which advises the Jury that if it finds that if plaintiff has sufficient permanent injury it may find permanent injury on the basis of probabilities only.

In the presence of the jury.

The Court: There are two forms of verdicts. You will use one form if you find your verdict in favor

of the Plaintiff against the Defendant. It reads as follows:

“We the jury duly impaneled and sworn to try the above-entitled cause find our verdict in favor of the plaintiff and against the defendant and assess damages in the sum of . . . . .”

If you find for the Plaintiff and find that she is entitled to damages, I will deduct from that amount \$27,000. The other verdict is the verdict for the Defendant. It reads:

“We the jury duly impaneled and sworn to try the above-entitled cause find our verdict for the Defendant and against the Plaintiff.”

Before you may bring in a verdict for the Plaintiff—it must be an unanimous verdict; it is signed only by the foreman. I want to admonish the foreman to be sure that the verdict represents the individual view of each member of the [209] Jury. The same thing is true if you bring in a verdict for the Defendant. There is a line for the signature of the foreman and the verdict must be unanimous.

(The bailiff was thereupon sworn and the jury retired to consider its verdict at 12:05 p.m., and thereafter, at 4:15 p.m. of the same day, the jury returned to the court room and the following further proceedings were had:)

The Court: Ladies and Gentlemen, have you arrived at a verdict?

The Foreman: Yes, Your Honor.

The Court: Will you hand it to Mr. Turtlelot. Read the verdict.

(The verdict was read by the Clerk.)

The Court: Poll the Jury.

The Clerk: Is this your verdict, Mrs. Taylor?

Juror No. 1: Yes.

The Clerk: Is this your verdict, Mr. Crumm?

Juror No. 2: Yes.

The Clerk: Is this your verdict, Mr. Harnsberger?

Juror No. 3: Yes.

The Clerk: Is this your verdict, Mr. Oberg?

Juror No. 4: Yes.

The Clerk: Is this your verdict, Mr. Jensen?

Juror No. 5: Yes.

The Clerk: Is this your verdict, Mr. Mosteller?

Juror No. 6: Yes.

The Clerk: Is this your verdict, Mr. Parker?

Juror No. 7: Yes.

The Clerk: Is this your verdict, Mr. Tracy?

Juror No. 8: Yes.

The Clerk: Is this your verdict, Mr. Ortman?

Juror No. 9: Yes.

The Clerk: Is this your verdict, Mrs. Seaton?

Juror No. 10: Yes.

The Clerk: Is this your verdict, Mr. Davis?

Juror No. 11: Yes.

The Clerk: Is this your verdict, Mr. Calkins?

Juror No. 12: Yes.

(Thereupon the Jury retired from the courtroom and the following proceedings were had.

The Jury was excused until 10 a.m. the next morning.)

The Court: Is there any reason why this verdict should not now be entered?



Mr. Gearin: May I have additional time within which to interpose a motion for a new trial and for a judgment notwithstanding the verdict?

The Court: Are you asking that we not enter the verdict?

Mr. Gearin: I would like to have a copy of the instructions.

The Court: The verdict is received and filed, but the [211] judgment shall not be entered.

We will adjourn now until 10 o'clock tomorrow morning.

(Case concluded.) [212]

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[Endorsed]: No. 13,433. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. Alma Raish, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 28, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 13,443

ALMA RAISH,

Appellee,

vs.

SOUTHERN PACIFIC COMPANY,  
a corporation,

Appellant.

APPELLANT'S STATEMENT OF POINTS TO  
BE RELIED UPON ON APPEAL

Southern Pacific Company, appellant herein, intends upon its appeal to rely upon the following points:

I.

The court erred in construing the covenant not to execute (pre-trial exhibit No. 38) as a covenant not to sue and not as a release.

II.

The court erred in failing to give defendant's requested instructions hereinafter quoted, each of which was prefaced by the following request:

"To the Court: The Court will understand that each subdivision of any instruction is to be deemed a separate and complete instruction."

III.

The court erred in failing to give defendant's requested instruction No. VI:

"A. Plaintiff must sustain the burden of proof against defendant by satisfactory evidence.

“B. Evidence is satisfactory only if it produces moral certainty or conviction in an unprejudiced mind.

“C. Only evidence which produces such moral certainty or conviction is sufficient to justify your verdict. Any evidence less than this is insufficient.”

## IV.

The court erred in failing to give defendant's requested instruction No. VII:

“A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a height insufficient for the safe passage of persons making ordinary use of the public highway.

“B. I instruct you that there is no evidence to support this charge.

“C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case.”

## V.

The court erred in failing to give defendant's requested instruction No. VIII:

“A. Plaintiff has charged that defendant was guilty of negligence in that it constructed and maintained its overhead crossing at a width insufficient for the safe passage of persons making ordinary use of a public highway.

“B. I instruct you that there is no evidence to support this charge.

“C. I accordingly instruct you to disregard the same and you are not to consider it in your determination of this case.”

## VI.

The court erred in failing to give defendant's requested instruction No. XIV C to E inclusive:

"C. In connection with the charge that the truck of Los Angeles-Seattle Motor Express was being operated without adequate or efficient brakes thereon, I instruct you that there was applicable at the time and place of the accident the following statute of the State of Oregon. (To the Court see 8 O.C.L.A. Sec. 115-376 (e):

"(e) The brakes of a motor vehicle or combination of vehicles shall be deemed adequate when, on a dry, hard, approximately level stretch of highway, free from loose material, such brakes shall be capable of stopping the motor vehicle or combination of vehicles, when operating at speeds set forth in the following table, within the distances set opposite such speeds, \* \* \*

Miles per Hour	Stopping Distance
10 .....	9.3 feet
15 .....	20.8 feet
20 .....	37.0 feet
25 .....	58.0 feet
30 .....	83.3 feet'

"D. Violation of the foregoing statutes is negligence as a matter of law.

"E. You are instructed that the violation of or failure to obey the requirements of a law which for safety or protection of others commands or requires certain acts or conduct or forbids or prohibits certain acts or conduct is negligence per se, or in other

words negligence in and of itself, regardless of what an ordinarily careful and prudent person might do in the absence of such law.”

### VII.

The court erred in failing to give defendant's requested instruction No. XVII:

“If you should believe from the satisfactory evidence that at the time plaintiff executed the agreement entitled ‘Not to Execute’ on July 26, 1951, plaintiff did not expressly reserve the right to sue Southern Pacific Company, then in that event I instruct you that plaintiff can not recover and your verdict must be against plaintiff and in favor of defendant.”

### VIII.

The court erred in giving the following instruction:

“Vehicular traffic is entitled to use the entire roadway including the shoulders and, in determining whether defendant maintained its overhead crossing with sufficient clearance, you are to consider whether an obstruction was being maintained over them, or any part of the roadway including the shoulders.”

### IX.

The court erred in withdrawing from the jury's consideration the charges that the driver of Los Angeles-Seattle Motor Express Inc.'s equipment was guilty of negligence in operating the same without an adequate or proper steering mechanism thereon.



X.

The court erred in denying the defendant's Motion for Directed Verdict.

XI.

The court erred in denying defendant's Motion for Judgment non obstante veredicto and for a new trial.

/s/ KOERNER, YOUNG, McCOLLOCH  
& DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ OGLESBY H. YOUNG,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed June 28, 1952. Paul P. O'Brien,  
Clerk.

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[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF  
CONTENTS OF RECORD

Southern Pacific Company, appellant herein, hereby designates the following portions of the record, proceedings and evidence upon the trial to be contained in the record on appeal:

Pre-trial Order.

Verdict.

Judgment entered May 7, 1952.

Defendant's requested instructions Nos. VI, VII, VIII, XIV, C to E inclusive, and XVII.

The following portions of the typewritten transcript of proceedings upon the trial:

Page 1 to that part of page 100 ending "Mr. Gearin: It is satisfactory, Your Honor," inclusive;

Page 135 beginning "The Court: Mr. Vergeers, I have been considering the offer of proof that you made, \* \* \*" to page 139 ending "The Court: That is all, Mrs. Raish. You may have your exception to this whole line of questioning, Mr. Gearin.", inclusive;

All of pages 188 to 212, inclusive.

Motion for Judgment non obstante veredicto or in the alternative for a new trial.

Order denying Motion for Judgment non obstante veredicto or in the alternative for a new trial.

Notice of Appeal and Supersedeas Bond.

Stipulation for use of original exhibits.

Clerk's Certificate.

This Designation, and Appellant's Statement of Points to be Relied Upon on Appeal.

/s/ KOERNER, YOUNG, McCOLLOCH  
& DEZENDORF,

/s/ JOHN GORDON GEARIN,

/s/ OGLESBY H. YOUNG,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed June 28, 1952. Paul P. O'Brien,  
Clerk.

